

THE LAW
OF
VOLUNTARY SOCIETIES,
MUTUAL BENEFIT INSURANCE
AND
ACCIDENT INSURANCE.

BY
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PREFACE.

The growth of the law of mutual benefit insurance during the six years which have elapsed since the publication of the first edition of this work has been very great. A glance at a monthly or an annual digest will show that quite as many cases relating to mutual benefit insurance as to ordinary life insurance are now decided by the courts. The law of voluntary societies does not develop so rapidly, but the civil and property rights of the members of such societies are of great importance.

The first edition was hurriedly prepared, and much of it was written after the work of printing had begun. While it was necessarily imperfect in many respects, its general outlines have been followed. The arrangement of the parts of the work, the subjects of the chapters, and the headings of the sections are such as to indicate where any point discussed may be found.

In treating of incorporated voluntary societies, it is difficult to determine how much of the general law of corporations should be included, and, in considering the contract of mutual benefit insurance, the temptation is great to discuss many interesting subjects which are applicable to life insurance generally. But it is of prime importance that the elements of the contract of mutual benefit insurance should be considered separately, and that, in treating of it, the contract of ordinary life insurance should be mentioned only to show the distinctions and differences between the two systems of insurance. It has, therefore, seemed to be the wisest course to exclude any general treatment of the law of corporations or of insur-

ance, and to confine this work strictly to the scope indicated by its title. Such subjects as are fully considered in standard text books on corporations or life insurance are omitted from this work, or are merely mentioned incidentally.

The law of accident insurance has been added to the work, and it is earnestly hoped that the chapters relating to this subject may not be found to be without value.

The writer has, for the most part, avoided theories and discussions, and has endeavored to present a complete and concise statement of the present state of the law. He is under obligations to E. Allen Frost, Esq., of the Chicago Bar, for his kind assistance in the publication of this work.

WILLIAM C. NIBLACK.

CHICAGO, December 1, 1894.

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PART I.

THE LAW OF VOLUNTARY SOCIETIES.

THE LAW OF VOLUNTARY SOCIETIES.

CHAPTER I.

MUTUAL BENEFIT SOCIETIES.

- § 1, 2. Generally.
3. The object is insurance.
4. Plans of organization.
5. Mutual assessment companies.
6. Rights of members of mutual benefit societies.

§ 1. **Generally.**—From the earliest times men have cultivated their gregarious and social instincts by the formation of tribes, guilds, fraternities, clubs and societies. They have organized them to resist encroachments on their liberties, to ward off different forms of oppression, to assist each other in times of need, to encourage skill and industry in trades, and for political, religious, commercial and social purposes. As the necessity arose for combining numbers of persons in any of these common objects, associations spread and developed, and when they became useless, they ceased to exist. There were, therefore, times when associations for certain purposes were popular and numerous, and, as interest waned in the cause which brought them into being, they were disorganized and abandoned. They were founded on general ideas, and conducted by men of little education on a narrow scale, toward the accomplishment of some specific and material object. The development of principles of organization and government was slow, but the experience of many years made possible the recent and wonderful growth in voluntary societies.¹ Mutual benefit societies are the outgrowth of the fraternities, clubs and guilds of previous generations, and in them will be found the mature and crystalized ideas of mutual assistance in time

¹ See Brentano; History and Development of Guilds; Encyclopædia Britannica; Article "Guilds."

of need and sickness, and of the care of the families of deceased members. The great object of such societies is to pay to such families a benefit fund, to enable them to procure the necessities of life.

§ 2. **Generally.**—Life insurance did not become a business of importance in England until about the commencement of the present century. In this country, the contract of life insurance met with little favor for many years later. The wonderful development of this business, of which evidences are to be seen on every side, has taken place within forty-five years. Mutual benefit insurance is of even more recent growth. There is probably no mutual benefit society of thirty years standing in this country; there are a few which have been in existence for fifteen or eighteen years, but by far the greater part of those now in existence have been organized within the past twelve years. But, within these few years, mutual benefit insurance has grown to enormous proportions, and in popular favor, until at the present time many hundred thousands of persons are carrying such insurance for the benefit of those for whom it is their duty and their pleasure to provide. The courts of every state are frequently called upon to determine the rights of parties under such contracts of insurance, and the rights of members and their beneficiaries, under contracts entered into for such worthy and commendable objects; are entitled to the tender and intelligent consideration of courts.¹

¹ In the North American Review for October, 1890, it is said of mutual benefit insurance:

“Starting twenty years ago under the form of fraternal insurance, it has developed into a great business, recognized by the laws of almost every state as of equal legitimacy with its level premium rival. It has formulated its methods, corrected its crudities, and to-day enrolls in its list of policyholders more than 2,500,000 citizens. During 1889 it paid over \$42,000,000 in death claims, swelling the total amount paid since organization, by the companies in active existence, to \$300,000,000. That it has become the

recognized plan of life, as distinct from investment, insurance is attested by the fact that it paid more in death claims in each of the last two years than did the level premium companies. Thirteen millions of people in this country are interested directly in its present and future, while the whole people have a common interest in the lessons of thrift which it teaches. It is far from necessarily antagonistic to the level premium plan. Its true rivalry is to accomplish better than that plan can the work of life insurance. There is abundant room for both. As compared with the level premium method,

The advocates of mutual benefit insurance claim for their plan many virtues and many advantages over all other modes of life insurance, and, on the other hand, the advocates of ordinary life insurance are bitter in their denunciations of mutual benefit societies. This work has nothing to do with this controversy. It is not the province of the writer on the legal aspect of such societies and their contracts to discuss the merits of the different plans of life insurance. It is enough that such societies exist, and are recognized in statutes and courts as a feature of the insurance business of the country. The standing given to these societies by the courts of the land is well expressed in a case where it is said: ' "It does not fall within the province of the court to discuss the relative merits of the different plans of life insurance, as between the old line systems and those formed on the co-operative or mutual assessment plan. It is enough to know that the statutes of Ohio authorize each plan, and each, doubtless, has its merits if properly administered, and demerits if not. Whatever be the system, it is the highest duty of the courts to see that the trust is faithfully administered. This is especially true in the co-operative or mutual assessment plan, where there is no reserve or surplus fund, and where the assessments to pay benefits are collected directly from the members, who generally do not understand the mysteries of life insurance management. These associations doubtless had their origin in the friendly and benevolent organizations and fraternities claiming like affiliation and purpose. These and other organizations, having for their object the mutual aid, benefit and relief of their

the assessment plan bases its claims upon the following propositions:

(a) Equal or greater security, without resort to excessive charges.

(b) Pure life insurance, without the concomitant of vast accumulation, with the resultant dangers of poor investments and misuse of funds.

(c) A limited, as against an unlimited, expense charged.

(d) Funds paid for death claim purposes held inviolate therefor.

(e) Equal security for that portion of the resources of the company

which consists in the obligations of policy-holders to pay on account of future death claims.

(f) Reserve funds available at all times as a conservator of the insurance-granting power of the company rather than as a menace to that function.

(g) Equal accountability to the state for the proper conduct of affairs, and equal recognition under the law of life insurance.

¹State v. Association, 38 Oh. St. 281.

members, or their families or heirs, when honestly and economically administered as a sacred trust, and not with a view to profit, are worthy the protection of law.”¹

§ 3. **The object of a mutual benefit society is insurance, not benevolence.**—History tells us that the origin of life insurance is traceable to benevolent motives. The object of such insurance was to provide a fund for the widow and orphans of a person whose income ceased with his life, and such an object was certainly benevolent. But whatever may be the motive underlying the great scheme of life insurance, it is certain that, in its practical application, life insurance is, and must be, founded upon contract. Its benevolence must flow not from mere good will, but from legal obligation. Its benefits must not depend upon the continuance of the charitable impulses of those who shall pay, but upon mutual promises. Although the object of the insured in making the contract, and the objects of the organization with which he contracts, are benevolent and not speculative, they have no bearing upon the nature and effect of the business conducted and the contract so made. Nor will the character of the contract be changed by the fact that the organization issuing it designates itself as a benevolent or charitable society, instead of an insurance company. The name of the society will not necessarily fix or establish its real character. The law will, when occasion requires, look behind the names of societies, and pass its judgment upon their schemes and modes of business.² If the prevalent purpose and nature of an association, of whatever name, be that of insurance, its legal character will not be changed by the benevolent or charitable results to its beneficiaries. A so-

¹A tabulated statement by the auditor of public accounts of Illinois of the condition of life and accident societies doing business in that state on the assessment plan in 1891, showed that there were fifty-six societies; that they issued during that year 44,732 certificates, covering \$140,512,000 of insurance; that 29,765 certificates representing \$97,890,500 of insurances were surrendered; that there were in force on December 31, 1891, 123,983 certificates of membership, covering \$359,299,625 of indem-

nity; that these fifty-six societies in their general business received from all sources during that year \$16,491,351, and disbursed for losses and expenses \$15,163,967. On December 31, 1891, they held assets amounting to \$9,215,988, and had actual liabilities amounting to \$636,850. The unpaid losses on this date, to pay which the members were assessable, amounted to \$3,243,480.

²Governors v. Union, 7 N. Y. 228; State v. Graham, 66 Iowa, 62.

ciety, which by contract agrees to pay to the beneficiary of a deceased member a sum of money, is a mutual insurance company, whatever may be the terms of payment of the consideration by the member, or the mode of payment of the sum to be paid in the event of his death.¹ In the leading case upon this subject it is said:²

"A contract of insurance is an agreement, by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract. The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificates of membership issued according to its charter, does not differ in any

¹ *Commonwealth v. Wetherbee*, 105 Mass. 161; *Granite Mutual v. Porter* (Vt.), 2 New Eng. Rep. 119; *State v. Society*, 72 Mo. 146; *State v. Association*, 6 Mo. App. 172; *State v. Brawner*, 15 Mo. App. 597; *Bolton v. Bolton*, 73 Me. 299; *Schunk v. Fund*, 44 Wis. 370; *Erdmann v. Order Hermann's Sons*, 44 Wis. 376; *Dietrich v. Association*, 45 Wis. 79; *Mason's Benevolent Society v. Winthrop*, 85 Ill. 537; *Illinois Masons v. Baldwin*, 86 Ill. 479; *Golden Rule v. People*, 118 Ill. 492, 9 N. East. Rep. 342; 7 West. Rep. 219; *Farmer v. State*, 69 Texas, 561; 7 S. W. Rep. 220; *Supreme Council v. Larmour*, 81 Texas, 71; 16 S. W. Rep. 633; *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Sherman v. Commonwealth*, 82 Ky. 102; 5 Ky. L. Rep. 874; *State v. Ins. Co.*, 30 Kan. 585; *State v. N. W. Mutual*, 16 Neb. 549; *State v. Association*, 18 Neb. 276; *State v. Nichols*, 66 Iowa, 26; *State v. Moore*, 38 Oh. St. 7; *Berry v. Indemnity Co.*, 46 Fed. Rep. 439; *Chartrand v. Brair*, 16 Colo. 19; 26 Pac. Rep. 152; *Rensenhouse v. Seeley*, 72 Mich. 603; see *Commonwealth v. Association*, 137 Pa. St. 412; 18 Atl. Rep. 1112; *Order v. State* (Md.), 26 Atl. Rep. 1040; *State v. Root* (Wis.) 54 N. W. Rep. 33; *Commonwealth v. Wetherbee*, *supra*.

² *Commonwealth v. Wetherbee*, *supra*.

essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, 'as many dollars as there are members in' the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members,' and from the guaranty fund of one hundred thousand dollars, established by the corporation under its charter. This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company." A corporation with salaried officers, paying commissions on risks obtained, insuring and admitting to membership any one having the requisite conditions of age and health, and requiring no other qualification for membership, can not evade the insurance laws by calling itself a benevolent society and obtaining a charter as such.¹

In discussing the subject of mutual benefit insurance, courts

¹ State v. Association, 6 Mo. App. 163.

have intimated that there is possibly a distinction between a society, the primary object of which is to contract with its members for the insurance of their lives, and a society organized for a social, literary, or benevolent purpose, to which a feature of mutual insurance is added for the purpose of mutual aid.¹ The distinction amounts to this, that while the contract is one of mutual life insurance, the societies having the feature of mutual aid, can not be said to be carrying on a general business of mutual life insurance. There is, however, no case in which it has been held that such a society is not an insurance company within the meaning of the statutes regulating insurance companies, except where such society was chartered under special laws providing for the incorporation of such societies. The text books, as well as the opinions of various courts, contain definitions of the contract of insurance, as it is applied to its various subjects; and although differently expressed, they all concur as to its substantive elements, that all which is essential to such a contract is the payment of a consideration by one party, and the promise of the other to pay an agreed amount upon the happening of the contingency specified in the contract, it being understood that the former party had an insurable interest in the subject-matter insured.² The payment of the benefit fund by a mutual benefit society to the beneficiary, or the payment of a "sick benefit," or "permanent disability indemnity" by the society to a member, is not voluntary, and in the nature of a gift, but is the fulfillment of a contract of insurance entered into by the member and the society.³ A contract by a society to pay, at certain stated periods of time, certain sums of money as endowments to living members, or, in case of their death, to pay certain other sums of money as benefits to their beneficiaries, is life insurance, both as to the endowment and the benefit.⁴ A mutual benefit society incorporated under special

¹Supreme Council v. Fairman, 10 Elkhart Mutual Aid, etc., v. Hough-Abb. N. C. 162; 62 How. Pr. 386; ton, 98 Ind. 149.

Durian v. Verein, 7 Daly, 168; Bolton v. Bolton, 73 Me. 299.

Barbaro v. Occidental Grove, 4 Mo. App. 429; State *ex rel.* v. Benefit Association v. State, 35 Kan. 253; State Association, 6 Mo. App. 172; Swift v. v. Mutual Aid Association, 35 Kan. San Francisco Board, 67 Cal. 567. 51; 9 Pac. Rep. 956.

²Bolton v. Bolton, 73 Me. 299;

laws, is governed by the law under which it is incorporated, and by the law relating to corporations, but, in carrying on its business of mutual assessment insurance, it is not subject to the statutes of the state, relating to life insurance and life insurance companies.¹ Mutual benefit societies are subject to the application of those legal principles applicable to other mutual life insurance companies.²

§ 4. **The plans upon which such societies are organized; supreme, co-ordinate and subordinate bodies.**—The details of the different plans upon which mutual benefit societies are organized are too numerous to mention. The main features of the largest and best known of such organizations, however, are soon told. The supreme or governing body is a corporation chartered under the laws of some state, for the purpose of assisting certain classes of beneficiaries on the death of a member. It is the legislative and governing body of the society, and is composed of its own officers and representatives from the grand lodges or councils of the different states. Each grand lodge or council is composed of its officers and representatives of the subordinate lodges or councils of the state in which it is located. The subordinate lodges or councils are the local bodies into which the members are received, or through which they are received into the society. The benefit fund is held in, and paid from, the treasury of the supreme body, and is made up of assessments levied on the members of the subordinate or local bodies. Certain qualifications for membership are usually prescribed, such as that an applicant shall be between certain ages, of sound health and of good moral character. He is usually required to sign an application for membership, which is in form and effect very similar to an application for life insurance, and to present himself for examination to the medical examiner of the subordinate body. When the medical examination has been approved by the medical examiner for the grand lodge of the state, or by the medical

¹ Hysinger v. Supreme Lodge, 42 Mo. App. 627; State *ex rel.* v. The Mutual Protection Association, 26 Oh. St. 19; State v. Iowa Mutual Aid Association, 59 Iowa, 125; 12 N. W. Rep. 782; Supreme Council v. Fairman, 62 How. Pr. 386; Rensen-

house v. Seeley, 72 Mich. 603; 40 N. W. Rep. 765; State v. Whitmore, 75 Wis. 322; 43 N. W. Rep. 1133; Whitmore v. Supreme Lodge, 100 Mo. 36; 13 S. W. Rep. 495.
² Erdmann v. Order of Hermann's Sons, 44 Wis. 376.

examiner of the supreme body, the applicant is eligible to an election as a member of the subordinate body. The supreme body is usually, if not always, incorporated, but the grand and subordinate bodies may, or may not, be incorporated. In some societies, the grand lodge of each state holds the benefit fund for, and makes assessments on, the members of the local lodges in that state.

§ 5. **Mutual assessment life insurance companies.**—There are many mutual insurance societies doing business on the assessment plan, which have no social organization. To distinguish them from mutual benefit societies, they may properly be called “mutual assessment life insurance companies,” but the law arising from the contracts of insurance issued by them does not necessarily differ in any particular from contracts of mutual benefit insurance. A company is incorporated under the laws of some state, and a general insurance business is conducted under the restrictions imposed by those laws. Among such restrictions may usually be found provisions against operating the company for profit, and against the payment of stated premiums for insurance. The classes of persons who may be beneficiaries of such insurance are often limited, and the contract of the company to pay a sum as a death benefit is usually made dependent upon the realizing of the amount from an assessment on its members. With such and kindred exceptions, these organizations carry on a general insurance business, and the contracts issued by them may be termed mutual assessment insurance policies. But while there may be a distinction between mutual benefit and mutual assessment insurance, there is no practical difference between them.

§ 6. **Rights of members of mutual benefit societies.**—The rights of a member of a mutual benefit society are two-fold—those which arise out of the contract of membership, and those which arise under his contract for benefits and insurance. In seeking to determine the rights of a member of such a society, it is necessary, therefore, to determine under which contract they arise. The corporate rights of a member of a mutual benefit society are subject to the control of the corporation; but his rights as an insured person rest upon his contract with the society.¹ In the first part of this work the rights of a

¹ § 136; *Bradfield v. Union Mutual*, *Rosenberger v. Washington Mutual*, 9 Weekly Notes of Cases (Pa.), 436; 87 Pa. St. 207.

member of a society will be discussed, and, in the second part, the contract of mutual benefit insurance will be treated of. At the present time, the laws of the different states provide for the incorporation of voluntary societies for any lawful purpose, not for profit, and almost all societies take upon themselves the rights and burdens under these laws, and are governed by the general laws relative to corporations. But a large number of societies are unincorporated. It is proposed now to treat of incorporated and unincorporated societies.

CHAPTER II.

CHARTER AND CONSTITUTION.

- § 7. Of charters in general.
- 8. The object of a society must be authorized by its organic law.
- 9. The plan of doing business must be authorized by the organic law.
- 10. Manner of doing business set forth in certificate of incorporation.
- 11. The object of a society must be legal.
- 12. When corporate existence may not be attacked.
- 13. Ultra vires.
- 14. Constitution of a society.
- 15. Incorporation of unincorporated societies.

§ 7. **Of charters in general.**—Charters are granted by the sovereign power of the state, and a society can not by its own act create, alter or amend its charter. An incorporated society is brought into being by its charter, and derives its powers from it. While such a society may create, amend or abrogate its constitution and by-laws, its charter is in no manner subject to its control. When the authorities speak of a charter, they mean an essentially different thing from a constitution created by the society. The articles of incorporation of a society and the statutes under which they are formed, are its charter and its fundamental law. They fix the rights of its members, and are in the nature of a fundamental contract in form between the incorporators, and, in practical effect, between the society and its members, which neither party is at liberty to violate.¹ The society and each member of it are bound by the charter, and neither can do what it does not authorize.²

A charter granted by the state is subject to the constitution and general laws of that state. As a natural person is

¹ *Bergman v. St. Paul Mutual*, 29 Minn. 275; *Hogan v. League*, 99 Cal. 248; *Rosenberger v. Washington Mutual*, 87 Pa. St. 207. 33 Pac. Rep. 924.

governed by the laws under which he lives, so a corporation, an artificial person created by the sovereign power of the government, must take its rights subject to the general laws. It is well settled that a person who deals with a corporation must, at his peril, take notice of its charter and of all the general laws of the state, affecting the business of corporations.¹ A society organized under an act providing for the incorporation of mutual benefit societies is governed by the law under which it is incorporated and by the law relating to corporations.

Where a society, having a charter from one state, afterward receives from another state a charter differing from the first in some particulars, the effect is not to amend the former charter but to create a distinct corporation. Two states can not, by legislative action, unite to create but one corporation.²

§ 8. **The object of a society must be authorized by its organic law.**—The act of incorporation is to a corporation an enabling act; it gives to it all the power it possesses. A corporation is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from the act, and to be capable of exerting its faculties only in the manner which that act authorizes.³ An act for the incorporation of societies can never be extended by construction to cases not reasonably within its terms. Where an act of the legislature authorizes the formation of corporations exclusively for literary, scientific and benevolent purposes, a society organized under it for religious purposes is not legally incorporated, and is usurping functions from which it may be ousted. There is a well-defined distinction between religious purposes and those which are merely literary and scientific, and religious purposes differ also from those of general benevolence.⁴ A society, the object of which is to endow the wife of each member, when he shall have married, with a sum of money equal to as many dollars as there are members of the association, to be raised by assessment on them, is not a "benevolent society" for the purposes of incorporation under laws relating to incorporation of

¹ Morawetz on Corp., § 591.

⁴ People *ex rel.* v. Benevolent Soci-

² Bachmann v. Supreme Lodge, 44 Ill. App. 188.

ety, 41 Mich. 67; People *ex rel.* v. Benevolent Society, 24 How. Pr. 216.

³ Head v. Ins. Co., 2 Cranch 127; Phillips on Insurance, pg. 9.

benevolent societies. It is clear from the plan of such a society that it is not intended to bestow any benefit or help without what is thought to be an equivalent. The undertaking of the society to pay is not in any sense benevolent, but is a *quid pro quo*; it is paid for.¹ A society for mutual insurance may not be incorporated under laws providing for the incorporation of benevolent societies.² But notwithstanding the fact that societies so organized are not corporations *de jure*, they must, at least as between their members, be regarded as corporations *de facto*.³ A society for pecuniary gain, organized for the purpose of aiding its members by loans or advances of money, is not a "benevolent" or "charitable" society within the meaning of the act of 1848, of New York, providing for the incorporation of benevolent, charitable, scientific and missionary societies.⁴

§ 9. **The plan of doing business must be authorized by the organic law.**—The plans of doing business set forth in the charters of societies, while they may and do differ widely in detail, must fall within the statutes under which such corporations are organized, and the purposes of the organization must be such as are provided for in those laws. In its articles of incorporation a society declared its object to be, among other things, to assist its members in the struggles incident to life, to secure for them in their old age mutual aid and protection, and to establish a fund for the benefit and relief of widows and orphans of deceased members. It was held that this society, having for its object in part the benefit of its members generally, and not wholly the benefit of the widows, orphans, heirs and devisees of deceased members, was not properly organized under the laws providing for benefits to widows, orphans, heirs and devisees of deceased members, and was usurping powers not conferred upon it by law.⁵ A proceeding in

¹ State *ex rel.* v. Critchett, 37 Minn. 13; 32 N. W. Rep. 787. wealth v. Weatherbee, 105 Mass. 149.

² Foster v. Pray et al., 35 Minn. 458;

³ State v. Critchett (Minn.), 32 N. W. Rep. 787; Foster v. Pray et al., 35 Minn. 458; 29 N. W. Rep. 155; People *ex rel.* v. Nelson, 46 N. Y. 477; Folger J., dissenting; State v. Benevolent Society, 72 Mo. 146; State v. Benefit Assn., 6 Mo. App. 163; Common-

29 N. W. Rep. 155.

⁴ People v. Nelson, 46 N. Y. 477; 60 Barb. 159.

⁵ The Golden Rule v. People *ex rel.*, 118 Ill. 492; People v. The Golden Rule, 114 Ill. 34; 28 N. East Rep. 283.

the nature of a *quo warranto* was instituted against a society, alleging that it was exercising the powers and functions of an insurance company without having complied with the insurance law. It was held that a society issuing policies on the lives of its members, payable in case of death to the widow, orphans, heirs and devisees of the members, and to them alone, and providing in its by-laws that each member may be assessed for the general expense fund in such sums as may be determined upon by the trustees, not to exceed \$20 in any one year, is not a life insurance company under the statute which requires a capital of \$100,000 in money or securities before transacting its business, and the act amendatory thereof. A clause in the act under which this society was organized provided that no member should receive any money as profit or otherwise. In construing this clause, the court held that it was designed to prevent the corporation from making dividends of profits among its members, and that the payment of an officer, who was a member, for services rendered, would not be "receiving money as profit." In discussing the questions involved, the court said: "The appellant was, no doubt, an insurance company in the general and enlarged sense of that term. It issued policies to its members, which were payable upon the death of a member whose life was insured, and did various other acts which are usually done by life insurance companies, but this did not necessarily bring it within the definition of a life insurance company, as that term is used in the act" regulating ordinary insurance companies.¹ When the law provides that a society may furnish relief to members on account of sickness, or other *physical disability*, it is proper for the society to provide in its contract of insurance for relief to members who shall have attained the age of seventy-five years; the attainment of such an age is a "physical disability," within the true intent and meaning of the act.² Where the law under which a society is organized provides that the members shall from time to time be assessed specifically to pay such losses and expenses as may be incurred, the society may not adopt a plan of insurance by which the members, upon advance payment of an agreed annual deposit, shall be exempted from liability to assessment to pay losses

¹The Commercial League v. People ex rel., 90 Ill. 166.

²Supreme Council v. Fairman, 62 How. Pr. (N. Y.) 386.

occurring during the year for which such pre-payment was made, and by which a contract of insurance may be declared forfeited for the non-payment in advance of an annual deposit, whether an assessment during such year to pay losses may be necessary or not. Such annual deposit paid in advance, based upon a table of mortality, and without reference to an amount necessary to pay losses which may occur during the year, is, in fact, a premium paid for carrying the risk, and not a specific assessment.¹ Where the law under which a society is organized provides that the "members shall receive no money as profit," any plan or scheme by which profits are made or divided is unauthorized. A plan by which annual deposits are required to be made, and if these annual deposits exceed the necessary expenses and losses during a given year, they are to be treated as "savings," out of which dividends are to be made to those who may then be members, is contrary to such provision of the law.² Where the statute under which a society is incorporated prohibits the payment of any money to a member as profits, and provides that no part of the funds collected for the payment of death benefits shall be applied to any other purpose, it is not lawful for the society to do business upon a plan by which it agrees that, at the end of ten years, the tontine or guarantee fund, consisting of twenty-five per cent of death assessments collected, will be distributed equally among the surviving members of the tontine class. Such a division of the tontine fund and its accumulation of interest among the surviving members is contrary to the provisions of the law.³

The charter of a society contained this provision: "The object or purpose of this association shall be the creation of a fund, by making mutual pledges and giving valid obligations of its members to and with each other, for their own insurance from loss by death of its members. * * * This association shall have no capital stock; it shall receive no premiums, nor make any dividend." An action of *quo warranto* was brought, claiming that the society was doing an insurance business not authorized by its charter. The society, by its plan of insur-

¹ State v. Association, 42 Ohio St. 555.

² State v. Association, *supra*.

³ State v. Association, *supra*; Chicago Mutual v. Hunt, 127 Ill. 257; 20 N. East. Rep. 55.

ance, required from a member a deposit "of one dollar for each and every year of his age, counted at his nearest birthday, which deposit shall form a pledge or guaranty for the payment of assessments for death losses and annual dues." In deciding that the society was doing such a business as was authorized by its charter, the court said: "But this fund is not a fund for the payment of losses, but a guaranty of the payment of the assessments. Upon the death of a member this guaranty deposit is paid to his beneficiary, and this in addition to and independent of the proceeds of the assessment. Upon a failure to pay his assessments, the deposit is forfeited to the company, and the interest received upon the investment of the deposit belongs to the company, and from these accumulations there may come a fund, out of which the amount which would be due in case of a death can be paid without any assessment, and provision is made for such contingency. But this provision against a large accumulation of funds in no manner changes the character of the association. Its purpose and object is still the collection of assessments from living members, to pay the beneficiary of a deceased member."¹ The scheme of a corporation was that each applicant for membership should pay \$5 for his certificate, \$2 a month thereafter to an endowment fund, and fifty cents dues every quarter, the latter to be used in defraying expenses, the endowment fund to be deposited and allowed to remain idle in bank; that the certificates should mature and be paid in numerical order, a certificate to mature whenever there is \$200 (the amount of the certificate) in the endowment fund, the holder of such certificate being compelled to pay \$5 and take a new certificate. Payments of \$15 a week for five weeks to sick or injured members was also provided for. It was held that the scheme was only to benefit the officers, and those who should have the lowest numbered certificates, and not all the members alike, and the company was not within the provisions of the act providing for "the maintenance of a society for beneficial or protective purposes to its members from funds collected therein," and empowering courts to grant certificates of incorporation to such societies. A court, after having improvidently granted a certificate of incorpora-

¹The State *ex rel.* v. Bankers' Association, 23 Kan. 499.

tion to such company, may revoke the same, since, having been granted without authority, it was void *ab initio*.¹ The statutes of Ohio provide that a society "may be organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members, * * * and such association shall not be subject to the preceding sections of this chapter," providing for the furnishing of security for the assured. A society, organized under the laws of Pennsylvania, was authorized to engage in the business of "insuring lives on the plan of assessments upon surviving members," without other restrictions than that policy holders should have an interest in the lives of members. This society attempted to do business in Ohio, without complying with the general insurance law in furnishing security for the assured, but the court held that this exemption was allowed on account of the limited nature of the life insurance which such societies were authorized to assume, being confined to insurance for the benefit of the families and heirs of members, and that the plan under which the Pennsylvania society was authorized to do business did not come within this exemption. The court further held that the law of comity was fully satisfied when foreign companies were permitted to do business in the state upon the terms prescribed for domestic companies.²

An act of Virginia provides that insurance companies on the assessment plan may be licensed to do business without being required to make the deposit of bonds provided for by the general law; and that every such company shall deposit with the auditor a copy of its constitution and by-laws, "which must show that all indemnities to beneficiaries are in the main provided for by assessments upon all surviving members." Under this act, such a company as would be exempt from the general law is one having a mutual system, by which a loss is in the main paid by laying an assessment for the purpose on the members of the company who are living when the loss occurs; but the act does not exempt a company in which all indemnities to beneficiaries are in the main provided by regular assessments, made before the death occurs, instead of by assess-

¹ *In re National Indemnity and Endowment Co.*, 142 Pa. St. 450; 21 Atl. Rep. 879.

² *State v. Moore*, 38 Oh. St. 7.

ments made upon all surviving members after the death occurs. The words "surviving members," as used in the act, are the antithesis of deceased, not of lapsed, members; and "assessments upon surviving members" are assessments to meet the loss caused by the death of a member, made after his death, upon those members who survive him.¹

§ 10. **Certificate of incorporation—How the manner of doing business should be set forth.**—A substantial compliance with all the terms of a general law for the incorporation of societies is a prerequisite of the right of forming a corporation under it. The articles of incorporation must contain everything in substance which is prescribed by the laws under which the corporation is organized.² Thus, a certificate of incorporation setting forth that "the manner of carrying on the business shall be such as the association may, from time to time, prescribe by rules, regulations and by-laws, not inconsistent with the laws of the state" is not in compliance with the law of the state, which requires the certificate to show "the manner of carrying on the business of said association."³

§ 11. **The object of a society must be legal.**—It is evident that the law will not sanction the incorporation of a society for an illegal purpose, and will refuse to recognize the legal existence of any such society. The state will not permit those who are subject to its laws as individuals to defy them as members of a society which has been brought into existence under its laws. Thus, while persons may undoubtedly meet and form societies for the purpose of effecting the modification or repeal of some obnoxious and oppressive law, still, under an act providing for the incorporation of voluntary societies, a corporation may not be formed for the purpose of opposing the enforcement of other acts, or of agitating for their repeal, or to influence legislation, or to give immunity to convicted parties by paying their fines for them. A society formed to oppose the enforcement of the liquor laws of a state may not be incorporated.⁴ Where the object of an incorporated society was to fix and control the price of salt, and the mode in which this was to be accomplished was by the manufacturers of salt on the

¹ *Mutual Ben. Life Co. v. Marye*, 85 Va. 643; 8 S. East. Rep. 481.

² *State v. Association*, 29 Oh. St. 399.

³ *Detroit Schuetzen Band v. Verein*,

⁴ *Morawetz on Corp.*, §§ 27 and 23. 44 Mich. 313.

Syracuse reservation leasing to the corporation the salt blocks owned by them, thus giving control of the quantity and price to the society, it was held that the purposes of the association were in violation of law, and that those concerned in it were guilty of a misdemeanor.¹ The object of a society was declared to be "to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed \$6,000, to be paid at marriage or endowment, according to the regulations adopted." A certificate of membership in such a society providing "that no member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate," and that "every member who shall have been in good standing for at least three months prior to his marriage shall be entitled to \$40 per month upon each \$1,000 named in his certificate for each whole month of his membership, provided that the same shall never exceed \$3,000, or so much thereof as shall be realized from one marriage assessment of all the members of this class,"—is not a marriage brokerage contract, but is void on grounds of public policy, as operating in undue restraint of marriage by offering an inducement for its indefinite postponement.²

§ 12. **When corporate existence may not be attacked.**—It may be stated as a general rule that the corporate existence of a society may not be attacked in a collateral proceeding. Where an action is brought on a written certificate of membership, sealed with the company's seal, signed by its president, and duly attested by its secretary, the society may not introduce evidence showing that the corporation was not fully organized at the time the certificate issued, and it is estopped by its own deed from so doing.³

§ 13. **The doctrine of ultra vires.**—Cases involving the

¹ *Clancey v. Salt Manfg. Co.*, 62 ton, 91 Ind. 202; *James v. Jellison*, Barb. 395; see *People v. Gas Trust Co.*, 130 Ill. 268.

² *White v. Equitable Nuptial Benefit Union*, 76 Ala. 251; see also *In re Mutual Aid Association for Unmarried Persons*, 15 Phil. Repts. 625; *In re Helping Hand Marriage Association*, 15 Phil. Repts. 644; *State v. Towle*, 80 Me. 287; 14 Atl. Rep. 195; 6 N. Eng. Rep. 469; *Chalfant v. Pay-* 483.

³ *Mutual Aid v. Paine*, 122 Ill. 625; 14 N. East. Rep. 42; *Hagerman v. Association*, 25 Oh. St. 186; *Hasselman v. Company*, 97 Ind. 365; *Meurer v. Association*, 95 Mich. 451; 54 N.W. Rep. 954; *Scheufler v. Grand Lodge*, 45 Minn. 256; 47 N.W. Rep. 799; see *Traders' Mutual v. Stone*, 9 Allen

doctrine of *ultra vires* have arisen and, doubtless, will arise in litigation upon contracts of insurance in mutual benefit societies, and contracts of other voluntary societies, but a full discussion of such a subject is beyond the scope of this treatise. It is sufficient here to say that there are two lines of decisions. The principle laid down in one may be stated as follows: Where it is a simple question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement can not be permitted, in an action founded upon it, to question its validity. The usurping or excess of corporate power is a matter to be complained of by the government, and places the society in danger of a judgment of ouster and dissolution. The other line of cases permits either party to the contract to set up the want of power in the incorporated society to enter into such a contract—not that either party stands in a position to take advantage of the want of such powers, but on grounds of public policy; and the defense so set up is regarded as the defense of the public, not that of the contracting party urging it. The authorities in favor of each of these principles might be multiplied almost indefinitely, though the current of the latest decisions is decidedly in favor of the proposition as first above laid down. It is proposed to illustrate the opposing principles by such cases only as have arisen in incorporated voluntary societies.¹ A mutual benefit society can not defend against a suit on one of its contracts of life insurance upon the plea of *ultra vires*, when it has been receiving the assessments on the certificate of insurance.² A society was organized under the law of Illinois providing for societies “for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives, by consanguinity or affinity, devisees or legatees of deceased members.” It issued a certificate of membership payable to William Blue, who was in no wise related to the member, Wm. R. Bailey. After Bailey’s death, Blue brought an action on the certificate, and the society set up, as a defense, its articles of incorporation under the above law; that plaintiff was not a legatee or devisee of Bailey and not related to him by

¹ See §§ 158, 168.

² *Matt v. Society*, 70 Iowa 455; 30 N. W. Rep. 799.

affinity or consanguinity, etc. In discussing this plea the supreme court of Illinois said: "It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by the statute. The defendant voluntarily issued the policy, it received the premiums, and Bailey fully, so far as appears, performed all that his contract required him to do. So far as he is concerned, the contract is an executed one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract, can it refuse, and defeat a recovery, by claiming that the contract is *ultra vires*? We think the law on this question is well settled that such a defense can not be made availing. Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefit from such contract, it can not invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract."¹ An act authorized the organization of societies for the purpose of securing certain benefits "to the family or heirs of any member upon his death." The contract of insurance showed, in the answers to interrogatories in the application, that the beneficiary named in the certificate of membership was in no way related to the member, and not in any way a member of his family, and, in the certificate, the beneficiary was described as "friend of" the member. The supreme court of Michigan held that the society might, in an action on the certificate, set up as a defense the want of insurable interest in the beneficiary, and said: "The association issued this certificate under circumstances which most strongly call upon the courts to enforce performance of its agreement, if certain imperative rules of public policy do not forbid. The defense set up in this case must be considered as that of the public, and not that of the defendant, as it stands in no position to interpose such a defense."²

¹ Bloomington Mutual v. Blue, 120 Ill. 121; 11 N. E. Rep. 331; 24 Ill. Mich. 473; 9 N. W. Rep. 497. App. 518; Martin v. Stubbings, 126 Ill. 387; 18 N. East Rep. 657; see § 178, 191.

² Mutual Ben. Ass'n v. Hoyt, 46

Although a certificate of membership in a mutual benefit society contain the name of a creditor of the member as beneficiary, in violation of the law authorizing such societies to issue certificates for the benefit of widows, orphans, or dependents of members, yet, where the certificate recognizes that there may be a change or substitution of such beneficiaries, and provides that, in case the member survives all the original or substituted beneficiaries, the insurance shall be for the benefit of the heirs of the insured, the administrator of the insured may maintain an action on such certificate, although the petition avers that the action is for the benefit of the creditor.¹ The opinion in the case holding this doctrine makes one or two valuable suggestions as to the application of the doctrine of *ultra vires* to contracts of mutual benefit societies. In this opinion it is said: "The designation of beneficiaries in the policy or certificates of membership is invalid, as the statutes under which the defendant corporation was organized did not authorize it to grant insurance for the benefit of friends. But an invalid designation of beneficiaries does not render the whole contract invalid. The contract in terms recognizes that there may be a change or substitution of beneficiaries, and there is a provision that, if the member shall survive all original or substituted beneficiaries, then his membership shall be for the benefit of his legal heirs. * * * If there is no other legal designation, this may take effect. The defendant contends that the declaration avers that the action is brought for the benefit of (the creditor named in the certificate), and therefore that the action can not be maintained. This objection can not be supported. If the plaintiff (the administrator) receives the money, it will be a good discharge to the defendant of its liability; and the defendant will not be responsible for the proper application of the money by the plaintiff. It is to be assumed, at this stage of the proceedings, that he will dispose of the funds properly; and he may be compelled to do so by judicial proceedings, to which the defendant would not be a necessary party. The averment that the action is brought for the benefit of (the creditor) is unnecessary, and may be disregarded."

A society in its charter declared its object to be "for the

¹ Rindge v. New England Mut. Aid Soc., 146 Mass. 286; 15 N. E. Rep. 628.

general purpose of improvement and welfare of the members and others, and for the particular object of mutual relief of the members of the association in time of sickness and distress." It was held that under this charter the society might properly carry on a system of mutual benefit insurance, and make the widows of deceased members the beneficiaries of the fund raised by assessment upon its members.¹

A society provided in its charter: "The business of said association shall be to afford relief to the widows and children of its deceased members, and to such business it shall be limited and restricted." A member became insured in the society, designated his wife as his beneficiary, and provided in the designation that his children should take the fund if he should survive his wife. He became indebted to the society in a large amount for money loaned him, and, by agreement between himself and the society, made a new designation "as per assignment attached, and balance, if any, to my wife * * * and, in case she be dead, to my children." The assignment attached was to the society to secure his indebtedness to it. Afterward the member died in good standing as such. The supreme court of Wisconsin held that his children, the wife being dead, were entitled to the whole fund, and that the loan of money by the society was in excess of its corporate powers and void. Ryan, C. J., dissented as to the ground upon which the decision was placed, and, upon the question of the validity of the loan, held that a corporation may employ the corporate property, when it would otherwise be lying idle and profitless, for such purposes as are not alien to its primary business, may rent its waste lands, invest its unemployed capital, and place its money at deposit account, citing *Brice on Ultra Vires*, 68. He further says: "If the insurance of the husband for the benefit of his wife and children were subject to his control, the corporation could lend its money to him or for his benefit, and take security on the contract of insurance. Whether the husband had such control, seems to be the controlling question in this case."²

A society organized for the purpose of aiding and assisting the widows, orphans, heirs or devisees of deceased members,

¹ *Gundlach v. Germania Mechanics Ass'n*, 49 How. Pr. 190.

² *Dietrich et al. v. Relief Association*, 45 Wis. 79.

under a law providing that "the members shall receive no money as profit or otherwise," may not contract with a member for the payment of a certain sum of money to him upon his arriving at the age of seventy years. Upon this subject the court said: "To permit the society to contract to pay to one of its members upon his arriving at seventy years of age, or after he has been a member in good standing for twenty-five consecutive years, a sum of money as profits upon his investments in the society, would be in fraud of the charter upon which it depends for existence, would virtually nullify and abrogate the wholesome statutes enacted for the purpose of regulating the business of life insurance companies, would set at naught the legislative intent, and be in conflict with the public policy of the state. Appellee is not a stranger to the corporation, but is himself a member of the society, and as such is chargeable with full knowledge and notice of its charter powers and of the requirements and prohibitions of the statute under which it is organized."¹

Where an incorporated society admits an ineligible person to membership, the incorporators are not bound by the illegal act, and the society is not liable to such member for benefits.²

An incorporated church may not, as a corporation, engage in the sale of tickets to the public for an excursion on board a steamer which the church has chartered for the occasion. Expenses incurred with a view of profit, and profits lost, can not be recovered from the owners of the vessel on their failure to make the stipulated voyage. Excursions as matter of trade

¹ *Canton Benevolent Soc. v. Rockhold*, 26 Ill. App. 141. In this case the court further says: "The present case is not governed by and is easily distinguished from the case of *Benefit Association v. Blue*, 120 Ill. 121, relied upon by appellee. There, the statute did not forbid the contract which was then under consideration; here, the statute does forbid the contract now in question. There the court said: 'It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed, that the contract involved is not absolutely prohibited

by statute. All that can properly be claimed is, that it was not expressly authorized by the statute.' Here, the charter of the appellant society contains an absolute prohibition against the character of benefits sought to be recovered, and the language of the statute is, 'the members shall receive no money, as profits or otherwise.'" See *Rockhold v. Canton Masonic Mut. Ben. Soc.*, 128 Ill. 440; 21 N. East. Rep. 794; affirming 26 Ill. App. 141.

² *Fitzgerald v. Association*, 69 Hun 532; 23 N. Y. Supp. 647.

or business with the public are not within the means or ends for which the church was incorporated. The measure of recovery, in a suit by the church against the owners, is the amount which has been paid as hire for the vessel.¹ Where the charter of a society restricts its membership to persons under the age of fifty years, the society has no power to authorize the admission of members over that age, and there can be no waiver of this qualification.² A Masonic lodge loaned a sum of money, and afterward brought suit to enforce its collection. The court held that there could be no recovery; that where the charter confers upon a society no power to lend money, and the society lends money without authority under its charter and takes a promissory note to secure the repayment, the contract is void. The court said: "No action to enforce the contract, whatever form the pleader's skill may give it, can be maintained."³

§ 14. **The constitution of a society.**—The articles of association of an unincorporated society bear the same relation to it that a charter bears to an incorporated society. They regulate the duties of its officers, and the duties and obligations of its members among themselves, and define the scope of its business.⁴ These articles of association are commonly called the constitution of the society, and such constitution is its fundamental law, and must govern its members in all things. All by-laws, rules and regulations must be passed in conformity with its provisions, and must not be in any wise in conflict with them.⁵ The constitution adopted by a mutual benefit society for the government of its subordinate lodges is the fundamental and organic law of each lodge in all its social and fraternal relations, and from it the lodge derives all its powers and rights as a subordinate part of the society.⁶ The constitution of an incorporated society is, however, of no greater force or dignity than its by-laws; in fact it is nothing more than a series of

¹ *Harrinan et al. v. Baptist Church*, 63 Ga. 186.

⁴ *Bray v. Farwell*, 81 N. Y. 600.

⁵ *Powell v. Abbott*, 9 Weekly Notes

² *Luthe v. Farmer's M. F. Ins. Co.*, of Cases, 231.

55 Wis. 543; see *Smith v. Pinch*, 80 Mich. 332; *Morrison v. Odd Fellows*, 59 Wis. 162; *McCoy v. Ins. Co.*, 152 Mass. 272; 25 N. East. Rep. 289.

⁶ *Chamberlain v. Lincoln*, 129 Mass. 70; *District Grand Lodge v. Cohn*, 20 Ill. App. 335.

³ *Grand Lodge F. & A. M. v. Waddill*, 36 Ala. 313.

by-laws under another name. Such a society has inherent power to pass laws for its internal government and regulation, and though it may pass two codes of laws, calling one its constitution and one its by-laws, they are the creatures of the same power, brought into being for the same purpose and are essentially the same. It may be that, by the provisions of its laws, such a society may give to the code called the constitution, a greater importance in its legislative and administrative affairs than it attaches to its by-laws, but essentially its constitution is not superior to its by-laws.¹

§ 15. **Concerning the incorporation of an unincorporated society.**—Where an existing unincorporated society is chartered, and its constitution is expressly recognized by the charter, such constitution thereby becomes practically, by reference, a part of the charter.² Where an unincorporated mutual benefit society procures a charter of incorporation, and, by a vote of the incorporated society, all members of the voluntary association are made members of the incorporated society without new applications, this is a reinsurance of the life of such members, on their original applications in the incorporated society. It is a mere continuation of the contract of insurance entered into by and between the associates, in which the incorporated society takes the place of the first society. The members so admitted into the new society have no greater rights against it, under their contracts of insurance, than they had against the first society, and any fact which rendered the contract invalid, as against the first society, furnishes a good defense for the new society to an action upon it. In other words, an invalid contract with an unincorporated society is not made valid by the incorporation of the members thereof, and the assumption by that corporation of the contracts of the unincorporated society.³

The legislature has no authority to compel any persons or society to become incorporated without its assent. No one can become a member of any private corporation without taking some steps for that purpose, nor does any existing society become absorbed or merged in any new corporation, so as to

¹ Supreme Lodge v. Knight, 117 Ind. 489; 20 N. East. Rep. 479.

³ Swett v. Citizens Mutual Relief Society, 78 Me. 541; 7 Atl. Rep. 394.

² Pulford v. Fire Department, 31 Mich. 458.

relinquish its former condition, without some action fully authorizing such a result. The membership of a corporation can not be increased by joint accessions without some action denoting unanimous consent; and one member of an unincorporated society can not be made a corporator in a different society or corporation by the action of other members not within the terms of their original compact; and a portion of the members of an unincorporated society can not, therefore, without unanimous consent, or some action of such society, or some provision of its articles, authorizing it, organize a corporation under a statute, which shall swallow up the society and thereby acquire title to its property,¹ nor can acquiescence in the claim of the corporation, that it is identical with such society, in the absence of any circumstances creating an estoppel, operate to extinguish the separate existence of the latter. Acquiescence by such society or its officers will not bind the members; nothing short of a complete cessation of its action will tend to prove acquiescence in a corporate merger. A Masonic lodge which was in existence before the organization, under the statute, of a corporation of the same name, and which had never by any action authorized or recognized the corporation as formed in the same behalf, and where each had been distinct in meetings, officers, property and other incidents, and not even identical in membership, is not merged in the corporation.² A dissatisfied minority of an unincorporated society can not, by procuring a charter of incorporation, acquire the right to the management of its property in opposition to the will of the majority of those interested.³

When an unincorporated society becomes incorporated and the new society assumes and agrees to pay all the obligations and liabilities of the old association, whether accrued or to accrue, recognizes the members of the old association as its members, and accepts assessments from them, a complete novation of the contracts of the old association is effected, and the new society is primarily liable upon the contracts so

¹ *Mason v. Finch*, 28 Mich. 282; 21 Abb. N. C. 99; *McGlynn v. Post*, 21 Henry v. Deitrich, 84 Pa. St. 286. Abb. N. C. (N. Y.) 97; *McFadden v.*

² *Mason v. Finch*, 28 Mich. 282. *Murphy*, 149 Mass. 341; 21 N. East.

³ *Henry v. Deitrich*, 84 Pa. St. 286; Rep. 868; see § 134.
Black Rabbit Association v. Munday,

assumed by it.¹ An act of the legislature, by which the members of several mutual insurance companies are made a new corporation, and which is to take effect "when accepted by the members of said corporations," does not constitute a member of one of the old companies who does not assent to it, a member of the new corporation, although the act be duly accepted by a majority of the members of each of the old companies.² The executive board of an unincorporated society may not convert it into a corporation, unless the power is conferred on it by the constitution and by-laws, or by an express resolution of the society. And it is necessary that a meeting to ratify the action of such a board which has exceeded its powers in incorporating the society, be called by competent authority, and that the members at large be notified of the meeting and its purpose.³ Members of an unincorporated society, who have incorporated themselves under its name without its consent, may be enjoined from using that name.⁴

¹ Burns v. Grand Lodge, 153 Mass. 173; 26 N. East. Rep. 443; Bank v. Mathews, 98 U. S. 621; Whitney v. Wyman, 101 U. S. 392; Kelley v. Railroad, 141 Mass. 496; 6 N. East. Rep. 745; Hart's Case, 1 Ch. Div. 307-317; Dowse's Case, 3 Ch. Div. 384; Brewer v. Dyer, 7 Cush. 337.

² Hamilton Mutual v. Hobart, 2 Gray (Mass.) 543.

³ Rudolph v. Southern Beneficial League, 7 N. Y. Supp. 135.

⁴ Rudolph v. Southern Beneficial League, *supra*; Black Rabbit Association v. Munday, *supra*; McGlynn v. Post, *supra*.

Where a number of persons seek to incorporate under an act, they must in good faith comply with its provisions; and where a public officer, whose duty it is to pass upon applications, refuses to issue a certificate of incorporation on the ground that certain requirements of the law have not been fulfilled in good faith, *mandamus* will not lie to compel him to issue such certificate, since his

duties are judicial in their nature. *In re Schmitt*, 10 N. Y. Supp. 583; *People v. Barnes*, 114 N. Y. 317; 20 N. East. Rep. 609; 21 N. East. Rep. 739. It was held in Massachusetts that, where it was the duty of the commissioner to pass upon the question whether a name applied for by persons seeking incorporation was so similar to any corporate name previously in use as to be liable to be mistaken for it, it must be assumed that the commissioner will do his duty and is competent to form a judgment on the question. The court refused to prohibit him by injunction from issuing a charter to a corporation under a very similar name to that of the corporation applying for the writ. It was also held that private parties could not be prohibited from applying to him for incorporation under a certain name, in the manner expressly authorized by statute. *American Order v. Merrill et al.*, 151 Mass. 558; 24 N. East. Rep. 918; see *Gregg v. Society*, 111 Mass.

185. The court further held that a corporation is not entitled to have its name protected as a trade mark as against a corporation with a very similar name, organized under the same act, since the degree of protection to which it is entitled is measured by the rights which that act confers upon it, and the limit is marked by the adjudication of the commissioner. See *Manufacturing Co. v. Nairn*, 7 Ch. Div. 834; *In re J. B. Palmer's Trade Mark*, 24 Ch. Div. 504, 517, 521; *In re Ralph's Trade Mark*, 25 Ch. Div. 194, 199; *Coats v. Thread Co.*, 36 Fed. Rep. 324. When there are no statutory provisions as to the choice of names, and parties or-

ganize a corporation under general laws, it may be that they choose the name at their peril, and that, if they take one so like that of an existing corporation as to be misleading, and thereby to injure its business, they may be enjoined if there is no language in the statute to the contrary. *Holmes v. Manufacturing Co.*, 37 Conn. 278; *Newby v. Railway Co.*, Deady, 609; *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. Rep. 94, 97. But these decisions do not apply to a case where the plaintiff and defendant both get their names under a statute requiring such an adjudication by a commissioner.

CHAPTER III.

BY-LAWS.

- § 16. Inherent power of societies to pass by-laws.
17. Generally.
 18. When by-laws are binding on members.
 19. By-laws must be legal.
 20. By-laws must be consistent with the charter.
 21. By-laws of unincorporated society must be consistent with its constitution.
 22. By-laws of unincorporated society must not be illegal.
 23. By-laws of an incorporated society must be reasonable and necessary.
 - 24, 25, 26, 27. Alteration, amendment and suspension.
 28. Repeal of by-laws.

§ 16. **Inherent power of societies to pass by-laws.**—An incorporated society has inherent power to make such by-laws, rules and regulations as may be necessary to carry its charter into effect, and to accomplish the purposes for which it was organized.¹ A grant, in general terms, of the power to make such by-laws is usually contained in the organic law of the society, or in the charter founded upon it, but it is by no means necessary, and adds nothing to the inherent power of the society in that regard.² An unincorporated society, however, exists by agreement of its members, and a majority has only such powers as are conferred by the articles of association.

¹ See § 114.

² “After a corporation is so formed and named, it acquires many powers, rights, capacities and incapacities, which are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course. As, * * *

for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation; for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body to make by-laws or private statutes politic.” 1 Blackstone’s Com. 475.

Such a society has no inherent powers. If no provision of the contract of association gives to the majority of the members the right to alter and amend such contract, the majority has no power of legislation over the minority, and changes and additions may be made only by unanimous consent. For this reason the articles of association usually confer upon the majority, or two-thirds of the members, the power to legislate for the general interests of the society, and provide how, and when, the constitution and by-laws may be altered and amended.

§ 17. **Generally.**—A by-law may be defined to be a rule of a permanent character, adopted by a society for its internal government, and obligatory upon all its members.¹ A resolution, which prohibits one particular officer of the society from inspecting its books, can not be called a by-law.² A by-law of an incorporated society must be general in its character and apply to all members alike. If it is invalid as to one member, it is invalid as to all. It must stand on its own validity, and it may not be shown, as sustaining its validity, that a dispensation was granted to a member against whom it was invalid, exempting him from its provisions, and that all the other members of the society assent to it, and are willing to be bound by it. A member of such a society can not be subjected to any conditions which do not apply to all alike, and can not be compelled to receive immunity from a by-law, as a matter of grace, when he is not bound by it as a matter of right. Upon the other hand, it is unjust to the other members that there should be personal exemptions of a general nature from any valid regulations which bind the mass of the corporators.³ An incorporated mutual benefit society can not ignore its by-laws, and lawfully contract with a particular member for life insurance on a different plan or basis than that which applies to all other members.⁴ Where a by-law is a mere rule of conduct in its business affairs, imposed on itself by the society for its own benefit and convenience, it may be disregarded by its officers.⁵ Where the by-laws declared that

¹ Waterman on Corp. § 72; Grant on Corp. 76.

² People v. Throop, 12 Wend. 187.

³ People *ex rel.* v. Benevolent Society, 41 Mich. 69.

⁴ Clevenger v. Mutual Life, 2 Dak. 114.

⁵ Hale v. Ins. Co., 32 N. H. 295; Union Mutual v. Keyser, 32 N. H. 313. As a general rule, corporations

clerks should hold their offices during the pleasure of the board of directors, it was held that the board might employ a clerk for a year, and bind the company by such employment.¹ If the charter prescribe the mode in which the by-laws shall be made and adopted, in order to their validity, that mode must be strictly pursued. But where the charter is silent upon this point, it may adopt its by-laws in any manner it may prescribe. When the mode of electing corporate officers is not prescribed by charter, it may be wholly ordained by by-laws. If a mutual benefit society be composed of separate bodies, whether co-ordinate or subordinate, the by-laws and rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the law by which they should be governed. It is a general rule that the by-laws of a society are binding upon no one except its officers and members, but where a person who deals with a society is acquainted with the methods of doing business pointed out in its by-laws for its government, he is presumed to have contracted with reference to them, and is bound by them.² A third person, not a member of the society, can only claim rights under its by-laws by showing that he entered into a contract based upon them and with reference to them.³ A by-law adopted at a meeting at which a quorum is not present is invalid.⁴

The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization. Where there is any ambiguity or inconsistency in the terms of such by-laws, that construction should be given to them which is most favorable to the rights of the member. It is for the court to decide whether it is within the power of the society, under the express or implied terms of its charter, to pass a given by-law.⁵ Whether a by-law is reasonable, or not, is for the court to determine, and evidence to the jury on that question is inadmissible.⁶ If part

have power to waive their rights, and are bound by estoppels *in pais*, like natural persons.

¹ Martino v. Ins. Co., 47 N. Y. Super. Ct. 520.

² Cummings v. Webster, 43 Me. 192; see § 97.

³ Flint v. Pierce, 99 Mass. 68.

⁴ Lockwood v. Bank, 9 R. I. 308.

⁵ State v. Overton, 24 N. J. L. 440.

⁶ Commonwealth v. Worcester, 3 Pickering (Mass.) 461.

of a by-law is void, and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void. The principle that a by-law may be void in part, and valid in part, applies only when the respective portions are wholly independent of each other.¹ It is sometimes said that by-laws need not necessarily be in writing, but may be adopted by long-continued and invariable custom. It must be remembered, however, that custom may not take the place of a by-law, but that it may be resorted to merely as evidence of the adoption of a by-law. No custom or usage is shown, which affords any evidence of the adoption of an unwritten law, where it appears only that the society, in a particular matter, has been accustomed to act in a particular manner, but where it does not appear when, how long, or to what extent, such custom has been pursued, or whether it has been uniform, or only adopted in particular instances. Such a custom will not be construed into a by-law. Where a society has expressly adopted a code of by-laws, other by-laws will not be implied from custom or usage. The adoption and promulgation of a code of by-laws, in the ordinary way, by an express vote of the members of a society, exclude the possibility of construing additional by-laws from the mere customs or modes of procedure which the society may see fit to adopt in the administration of its affairs.² Unless otherwise provided, the power to make by-laws is in the members of the society at large, but it may be delegated to the board of directors. By-laws must be produced in evidence to show what they are, and what power and authority they confer, and an officer of the society may not be permitted to testify as to these matters.³ They may be proved by printed copies known to and accepted by the member against whom it is sought to enforce them.⁴

§ 18. **When by-laws are binding on members.**—By-laws are subject to certain laws which are set forth in detail in this chapter. Subject to these laws, the by-laws of an incorporated

¹ Angell and Ames on Corp. § 358; ² District Grand Lodge v. Cohn, 20 State v. Curtis, 9 Nev. 325; King v. Ill. App. 335; see Wahn v. Bank, 8 Stewart, 8 T. R. 256; Amesbury v. Serg. & Rawle, 73.

Bowditch Mutual, 6 Gray (Mass.) ³ Lumbard v. Aldrich, 8 N. H. 31. 596; Rogers v. Jones, 1 Wend. (N. Y.) ⁴ Atlantic Mutual v. Saunders, 36

238; Supreme Council v. Forsinger, N. H. 252; Mutual Ins. Co. v. Bratt, 125 Ind. 52; 25 N. East. Rep. 129. 55 Md. 200.

society regularly passed are binding upon all members. The power of government of an incorporated society is in the majority, under the contract of membership. Under this contract, a member is bound by the by-laws in force when he becomes a member, and such as shall thereafter be regularly passed. If the member shall object to such by-laws as are subsequently passed, he may resign his membership and escape the effect of them; but if he continue his membership, he is bound by them. Where the articles of association of an unincorporated society are silent as to any power to alter them, and a majority of the members vote to change them, the change so made is valid and binding as to all who voted for, assented to, or in any way acted on, or enjoyed the benefits of such change. And acquiescence in the change for a time after it has become known to a member will be construed as an adoption of it. But such change is not binding on a protesting minority. Where, however, power is given to the majority of the members at a regular meeting to alter rules affecting the general interests of the society, the changes made will be binding upon all members continuing their membership.¹ One who becomes a member of a mutual benefit society is chargeable with knowledge of the provisions of its charter and by-laws, and is bound by them. He can not be ignorant of them, nor can he refuse obedience to them, unless they are illegal, or require the performance of acts which the law forbids.² The provisions of the established by-laws of a mutual benefit society are elements of the contract of insurance. They are factors which can not be disregarded, and all who become members must know this fact. A person who enters a society must acquaint himself with its laws, for they, to the extent of their provisions, measure his duties, his rights and his liabilities. It is not one by-law or some by-law of which he must take notice, but he must take notice of all which affect his rights or interests. Where there is an express and clear reservation of the right to amend the by-laws, he is bound to take notice of the existence and effect of that reserved power.³

¹ Kehlenbeck v. Norddeutscher Manning v. San Antonio Club, 63 Bund, 10 Daly (N. Y.) 447; see § 18. Texas, 166; 51 Am. Rep. 639; St.

² Bauer v. Simson Lodge, 102 Ind. Mary's Soc. v. Burford's Adm'r, 70 262; 1 N. E. Rep. 571; Coles v. Pa. St. 321.

Iowa State Mutual, 18 Iowa, 425; ³ MacDowell v. Ackley, 93 Pa. St.

It is sometimes said that a member is bound to know the rules of the society. This is true, but it is not to be understood by the use of the word "rules" that reference is made to the regulations adopted by the officers of the society for the transaction of business, but rather such rules as enter into the constitution of the society as provisions of its charter or its by-laws. Rules in the nature of instructions to officers and agents, directing the discharge of their duties, etc., can not be meant, but rather the rules whereby the liability and rights of members of the society are fixed, which are parts of the institution.¹ Where the by-laws of a society set forth specifically the powers and duties committed to local agents, a member is charged with knowledge of the limits of such powers, and can not claim that notice to one of such local agents concerning matters without the scope of his authority and duty, under such by-laws, is notice to the society.² A person who becomes a member of a mutual benefit society assents to the by-laws existing at the time he acquires a membership. While he may always insist that a certain by-law is contrary to law, and, for that reason, void, yet he may not assail the binding force of a by-law existing when he was admitted into the society, on the ground that it was not regularly adopted, or that the society had no power to make it.³

§ 19. **By-laws of a society must be legal.**—The by-laws of a society must be consistent with the laws of the land in which it exists, or does business. In this country they must be consistent with the constitution of the United States, and the acts of Congress pursuant thereto, and the constitution, statutes and general laws of the state in which the society is organized, or is doing business. A member is not bound by a by-law which is contrary to law, even though he may have assented to it. Where the provisions of the constitution and

277; *Supreme Lodge v. Knight*, 117 Pa. St. 402; *Adrian v. Roome*, 52 Ind. 489; 20 N. East. Rep. 479; *Poultney v. Bachman*, 31 Hun 49; *Supreme Commandery v. Ainsworth*, 71 Ala. 436.

¹ *Walsh v. Insurance Co.*, 30 Iowa 133-145; *Treadway v. Insurance Co.*, 29 Conn. 68; *Hale v. Insurance Co.*, 6 Gray (Mass.) 169.

² *Mitchell v. Lycoming Mutual*, 51

Pa. St. 402; *Adrian v. Roome*, 52 Ind. 489; *Eaton v. Supreme Lodge*, 22 Cent. Law Jour. 560; *Painter v. Association*, 14 Ins. Law Jour. 556.

³ *Waterman on Corp.* 235; *Pfister v. Gerwig*, 122 Ind. 567; 23 N. East. Rep. 1041; *Insurance Co. v. Perrine*, 7 Watts & Ser. 348; *Miller v. Association*, 42 N. J. Eq. 457; 7 Atl. Rep. 895.

by-laws of a society permit a contract of insurance to be assigned or made payable to a stranger who has no insurable interest in the life of a member, and the laws of the state in which the contract is executed, hold such an assignment or designation of beneficiary to be void, as against public policy, such provisions are inoperative and void.¹ By-laws of a society which forbid a member to work at his trade at such prices as he chooses to accept, and compel him to join in a "strike" by punishing him for refusing to do so, are void as against public policy.² It is not illegal for workmen to form and act as an association for the purpose of protecting themselves against the encroachments of their employers, and to agree, in furtherance of such object, not to teach others their trade unless by consent of the society. It has been said: "In the relations existing between labor and capital, the attempt by co-operation, on the one side, to increase wages by diminishing competition, or, on the other, to increase the profit due to capital, is within certain limits lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor or capital. It is not easy to give a definition which shall include every form of such coercion; it is enough that in the compact before us there is no evidence of any purpose to use such unlawful means in any form."³ A by-law of a society imposed a penalty for violation of its by-laws, one of which forbade any of its members to work for any person who should employ non-members. It was held that the by-law was not illegal.⁴ An association of stevedores of a port, by by-law, fixed rates at which its members should work, and penalties for the violation of the by-law, to be paid to the association. The court held the by-law valid, and the penalty recoverable.⁵ One of the by-laws of an association provided that any member who should bind his son in a shop where non-union men were employed, should

¹ Price v. Supreme Lodge, 68 Texas 366; 4 S. W. Rep. 633; Schonfield v. Turner, 75 Texas 324; 12 S.W. Rep. 626. ciety, 6 Thompson & Cook (N. Y.) 88. ²Snow v. Wheeler, 113 Mass. 179.

³ Doyle v. Benevolent Society, 3 Hun (N. Y.) 361; Farrer v. Close, L. R., 14 Wend. (N. Y.) 9.

⁴ Commonwealth v. Hunt, 4 Met. (Mass.) 111; but see People v. Fischer, 14 Q. B. 602; Doyle v. Benevolent So- ⁵Stevedores Ass'n v. Walsh, 2 Daly (N. Y.) 1.

be fined, and it was held to be illegal.¹ An incorporated medical society established a tariff of fees for medical services to be performed by its members, fixed a minimum salary to be received by any member who should be appointed to any public office in a professional capacity, and adopted a by-law declaring that it should be dishonorable, and subject him to expulsion, for any member to accept any appointment at a less sum than was specified therein. The court held that the by-law was against public policy and void.² A by-law providing that no member of the society should sell a gun-barrel to any person of the trade, not a member residing in London, etc., was held invalid, as being in restraint of trade.³

A society was incorporated for the purpose of cultivating the art of music, for the promotion of good feeling among its members, and for the relief of its unfortunate members. The by-laws provided that it should be the duty of every member to refuse to perform in any orchestra or band in which any person, or persons were engaged who were not members of the corporation in good standing, and also provided that it should be deemed a breach of good faith and fair dealing between members for a member to employ a suspended member or a person not a member. They also required a residence of six months in the United States before a person was eligible to membership. An action was brought to restrain the society from enforcing its by-laws and from fining the plaintiff for employing a person in his orchestra, who was not a member of the union. The court held that the effect of the by-laws above enumerated was to create a close corporation, and to force each member of the profession to also become a member of the union, unless he preferred to abandon his calling or seek some other locality in which to exercise it; that the by-law which required a residence of six months in the United States before eligibility to membership virtually prohibited, in view of the restrictions contained in the other by-laws, a musician on coming into the United States, from exercising his calling; that such by-laws were not calculated to promote the general good feeling and good fellowship which it was the object of

¹ *Rigby v. Connol*, L. R., 14 Chan. Div. 482-492.

² *Society of Gunmakers v. Fell*, Willes' Rept. (Eng.) 384.

³ *People v. Medical Society*, 24 Barb. 570.

the union to obtain, and were not only against public policy, but antagonistic to the right of every man to earn his livelihood by honest labor.¹

All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights,—are *pro tanto*, illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable.²

¹Theodore Thomas v. Mutual Protective Union, 49 Hun 171, Daniels, J., dissenting in a vigorous opinion in which the following authorities are cited and reviewed: People v. Fischer, 14 Wend. 9; Regina v. Duffield, 5 Cox C. C. 404; Regina v. Shepherd, 11 Cox C. C. 325; Dunham v. Village of Rochester, 5 Cow. 462; Hooker v. Vandewater, 4 Denio 349; Stanton v. Allen, 5 Denio 434; Springhead v. Reily, L. R., 6 Eq. Cas. 551; Commonwealth v. Hunt, 4 Met. 111; Bowen v. Matheson, 14 Allen 499; Carew v. Rutherford, 106 Mass. 1; Master Stevedores' Association v. Walsh, 2 Daly 1.

²Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48; 35 Alb. L. J. 208; Walker v. Cronin, 107 Mass. 555; Johnston Co. v. Meinhardt, 60 How. Pr. 168; Slaughtcr-house Cases, 16 Wall. 36, 116; Mogol, etc., Co. v. McGregor, L. R., 15 Q. B. 476; Smith

v. People, 25 Ill. 17; 76 Am. Dec. 783, note; *In re Baldwin*, 27 Fed. Rep. 187; State v. Donaldson, 32 N. J. L. 151; 90 Am. Dec. 649, note; State v. Cole, 39 N. J. L. 324; People v. Richards, 1 Mich. 216; 51 Am. Dec. 75, note; Commonwealth v. Hunt, 4 Met. 111; 38 Am. Dec. 346, note; People v. Fischer, 14 Wend. 9; 28 Am. Dec. 501, note; Mapstrick v. Range, 9 Neb. 390; 31 Am. Repts. 415; Kimball v. Harman, 34 Md. 407; 6 Am. Repts. 340; State v. Crowley, 41 Wis. 271; 22 Am. Repts. 719; Morris Run Coal Co. v. Barclay, 68 Pa. St. 173, 187; Clancey v. Salt Man'f'g Co., 62 Barb. 395. The by-laws of a society may be void as being in restraint of trade. *Berwick v. Johnson*, Lofft. 334; 2 Kyd on Corp. 125 *et seq.*; *Gunmakers v. Fell*, Willes, 384; *Case of Tailors of Ipswich*, 11 Co. 53; *Grant on Corp.* 82; *Rogers v. Brenton*, 10 Q. B. 26; *Hayden v. Noyes*, 5 Conn. 391; *Moore*

The statutes of a state, which apply to corporations formed for purposes other than profit, govern incorporated mutual benefit societies, and, when these statutes provide that the term for which officers may be elected shall be one year, neither the incorporators, nor the trustees first elected, are authorized to adopt a by-law or regulation providing that they shall hold office during life.¹ A stock exchange may make membership therein subject to the rule, that, if the member becomes insolvent, his seat may be sold for the benefit of his creditors among the other members of the board.² Payments of the proceeds of such sale to such members are not preferences, void by the bankrupt law.³ Where the scheme of a society was the annual distribution by lot among its members of works of art purchased by their subscriptions, it was declared to be a lottery, and a violation of law.⁴ By-laws can not be permitted to destroy or amend the express provisions of a contract of insurance, without the consent of the member.⁵ It has been held, in many states, that, while societies may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed methods before invoking the power of the courts, it is not lawful for them to entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the society, or a contract of insurance issued by it.⁶ A by-law of a society, setting aside a certain fund from which a certain sum is, upon the death of a member, to be paid to the living

v. Bank, 52 Mo. 377; *Sayre v. Association*, 1 Duvall (Ky.) 143; *Nash v. Page*, 80 Ky. 539; *Huston v. Rentlinger*, 91 Ky. 333; 15 S. W. Rep. 867. An association of stenographers, formed to establish and maintain uniform rates of charges, and to prevent competition among its members under certain penalties, is illegal, as in restraint of trade and against public policy, and one member can not maintain an action against another for damages occasioned by the latter underbidding the former, in violation of the rules of the association. *More v. Bennett*, 140 Ill. 69; 29 N. East. Rep. 888.

¹ *State v. Association*, 38 Oh. St. 281.

² *Belton v. Hatch*, 109 N. Y. 593.

³ *Hyde v. Woods*, 94 U. S. 523.

⁴ *Governors v. American Art Union*, 7 N. Y. 228.

⁵ *Becker v. Farmers' Mut. etc.*, 48 Mich. 610; *Ins. Co. v. Connor*, 17 Pa. St. 136; *Ins. Co. v. Harvey*, 45 N. H. 292; *Ins. Co. v. Butler*, 34 Me. 451; *Morrison v. Wisconsin Odd Fellows, etc.*, 59 Wis. 162; 18 N. W. Rep. 13; *Gundlach v. Germania Mechanics Ass'n*, 49 How. Pr. 190; *Pulford v. Fire Department*, 31 Mich. 458.

⁶ See §§ 132-358.

members holding numbers just above and just below the number of the deceased member, is illegal as being in the nature of a wagering policy.¹ A society organized as a corporation under the laws of a state, may not by its by-laws subject itself or its members to the jurisdiction of an authority existing outside of the state, and beyond the control of its laws. A by-law of a corporation existing under the laws of Michigan may not require its members to pay assessments levied by a supreme lodge incorporated under the laws of Kentucky. The court said upon the subject: "The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the state permitting it, nor could there be any law of the state which would subject a corporation created and existing under the laws of this state to the jurisdiction and control of a body existing in another state, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being."² A corporation of a state can not permit, by by-law, a foreign corporation to interfere in its affairs, nor can it permit its members to be disfranchised by another body outside of it for any cause or in any manner.³ A by-law of a merchants' exchange, requiring its members to submit their controversies to arbitration, and prohibiting them from bringing suit in court against each other to settle their claims, has been held to be illegal.⁴ In a beneficial society known as "Good Samaritans," there was a by-law providing that, when a member should for any cause be expelled, he should be suspended in the air by means of a rope fastened around the waist. This ceremony had often been performed upon others in the presence of a certain member, but when she was expelled, she resisted to the extent of her ability. The rope was, however, fastened around her waist,

¹ The Golden Rule v. People, 118 Ill. 492; 9 N. East. Rep. 342.

² Lamphere v. United Workmen, 47 Mich. 429.

³ Allnut v. High Court of Foresters, 62 Mich. 110; 28 N. W. Rep. 802; State v. Miller, 66 Iowa, 26; 23 N. W. Rep. 241.

⁴ State v. Merchants' Exchange, 2 Mo. App. 96; State v. Chamber of Commerce, 20 Wis. 69; Sweeney v. Society, 14 Weekly Notes of Cases,

466-486.

and an attempt was made to draw her up until her feet should not touch the floor, when she fainted. Those who had thus attempted to hang her were indicted, and convicted of assault and battery. The court said: "Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery, had the parties concerned not been members of the society of 'Good Samaritans,' it is not the less a battery because they were all members of that humane institution."¹ By-laws or regulations are properly only rules for future action. *Ex post facto* laws are no more lawful for corporations than for states, and all by-laws contrary to the general principles of the common law, or the policy of the state, are void. The effect of an amendment of the constitution of a corporation, which before contained no such provision, whereby it was declared that any member who should fail to pay the whole of his dues which should then be in arrears, or any indebtedness to the corporation, on or before a day named, should, from and after that day, cease absolutely to be such member, without any further action whatever of the corporation or its trustees, and that the secretary should drop the names of all such delinquent persons from the roll of members, is not that of a regulation, but of an adjudication on existing defaults, analogous to a foreclosure decree fixing a short term of payment; and it is clearly *ex post facto*, in that it enforces a new penalty beyond those existing at the time of default.² A by-law made in pursuance of an express power in the charter to make by-laws, is void, if contrary to the general or statute laws of the state.

§ 20. **By-laws must be consistent with the charter.**—By-laws of a society inconsistent with the provisions or main objects of its charter are *ultra vires* and void. Where, by the charter, certain classes of persons are to be benefited, a corporation has no authority to provide by a by-law for other beneficiaries, or to exclude any class provided for by the charter.³ Where the charter provides that the devisees of members shall be among those who may take the benefit fund, restric-

¹ State v. Williams, 75 N. C. 131. East. Rep. 847; Supreme Council v.

² Pulford v. Fire Department, 31 Perry, 140 Mass. 580; Kentucky Masonic v. Miller, 13 Bush (Ky.) 489; Mich. 459.

³ Briggs v. Earl, 139 Mass. 473; 1 N. see §§ 158, 165, 168.

tions upon the power or right of the member to make a will are inoperative and void.¹ Where the charter prescribes the conditions and qualifications of membership in a society, no additional conditions and qualifications may be made in the by-laws.² A member of a society is not bound by a by-law which is contrary to its charter, even though he may have assented to it.³ The controlling consideration in determining the validity of corporate by-laws is the nature and purpose of the corporation. If a by-law is clearly alien to its nature, and a departure from its purpose, it will be held *ultra vires*, and void; if not, and it is consistent with the general laws of the land, it will be valid. No rules can be framed, which would be of any practical value in applying this test, but the application of it to individual cases must always remain a matter involving the exercise of sound practical judgment. Where the statute under which a corporation was organized required a majority of the trustees to do a corporate act, and a by-law authorized a vacancy in the office of trustee to be filled by a less number than a majority, it was held that the by-law was contrary to the charter and void.⁴ Where the charter of a society provides that for non-payment of an assessment the officers may forfeit a contract of insurance, the society may, by by-law, provide that such non-payment shall work a forfeiture, in which case no action of the officers will be necessary.⁵ Where the charter of a society limits and restricts the number of "active" members which a society may have at one time, a by-law is void, which provides for the election of "contributing" members in the same manner as active members, after the active list is filled.⁶ Where the charter of a corporation provides for specific assessments to pay losses and expenses, a by-law is *ultra vires* and void, which requires the members to pay an annual deposit in advance each year, instead of assessments, and provides that the assessment liability of members shall be, for each year of

¹ Rand v. Association, 3 Mackey (D. C.) 68.

⁴ State v. Curtis, 9 Nevada 325.

² People v. Benevolent Society, 41 Mich. 67; People v. Benevolent Society, 24 How. Pr. 216.

⁵ Equitable, etc. v. McLennon (Sup. Ct. Tenn.), 6 Ins. L. J. 124.

⁶ Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

³ People v. Benevolent Society, *supra*.

the term of the contract, equal in amount to the annual deposit, but in no case shall any member be assessed in one year for an amount exceeding the annual deposit.¹

The charter of a religious society authorized the making of by-laws requisite for the good government and support of the church, and provided that no persons should have a vote in the election of its minister, except those who had been regularly admitted, and had been members of such church for twelve months preceeding the election. A by-law was enacted, providing that a member of the church, whose pew rent had been in arrears for a longer time than one year prior to the election, should not be entitled to vote. This by-law was held to be valid and not contradictory to the act of incorporation. The court said: "No person is excluded from voting, unless he is in default in a matter essential to the support of the church, and he may reinstate himself in his privilege by paying his debt. Nothing is more manifestly for the good of the church than this by-law."² A law of New York provides that "the directors * of any society or corporation organized under the provisions of this act * shall be jointly or severally liable for all debts due from said society or corporation, contracted while they are trustees," etc. A policy issued by a society incorporated under this act provided that "the directors of this society, either individually or as a body, shall not assume any liabilities personally by reason of the issuance of this certificate." It was held that the foregoing statute formed a part of the charter of the society and that the provision of the policy, being repugnant thereto, was void.³ An article of the charter of a society provided: "Every member of this union shall be entitled to one hundred dollars for funeral expenses, provided that he has been a member six months, and not more than three months' dues in arrears at the time of his death, the money to be paid to the deceased's nearest relative." A by-law provided: "Any member becoming three months in arrears shall not be entitled to benefits until eight weeks have expired from the time

¹ *State v. Association*, 42 Oh. St. 555.

² *Greene v. Walton*, 13 N. Y. Supp. 147, Learned, P. J., dissenting.

³ *Commonwealth v. Cain*, 5 S. & R. (Pa.) 509.

he settles up in full." This was held to be inconsistent with the charter.¹ The charter of a society stated its object to be to "afford relief, comfort and protection to its members." A by-law providing for the payment of benefits to defray the funeral expenses of members and of their wives was held to be proper.²

§ 21. **By-laws of an unincorporated society must be consistent with its constitution.**—The constitution of an unincorporated society, is, as has been said, the fundamental law of the society; and it follows that in case of a conflict between the constitution and the by-laws the constitution must prevail.³

§ 22. **By-laws of an unincorporated society must not be illegal.**—In respect to the by-laws of an unincorporated society, the court has no visitatorial power, and may not determine whether they are reasonable or unreasonable. The court regards the members of such societies as standing, to some extent at least, in the relation of partners, and permits them to make their own compacts so long as they are legal.⁴ When a by-law of such a society is legal, the only question which a court may examine is, whether it has been adopted in the way agreed upon by the members in their contract of association. If a member of such a society deems its by-laws unreasonable and oppressive, his only remedy is to withdraw from membership in it. The theory of an unincorporated society is that men shall come together of their own free will and accord, and be bound by such legal rules as shall be passed in the manner agreed upon. There are cases in the books where the by-laws of an unincorporated society have been declared to be just and reasonable, but there are none, it is believed, where the by-laws of such a society have been held to be unreasonable and void.⁵

§ 23. **By-laws of an incorporated society must be reasonable and necessary.**—But it is a governing rule with regard to corporations, that their by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void. The

¹ Sherry v. Union, 139 Pa. St. 470; 20 Atl. Rep. 1062.

² Lysaght v. Association, 55 Mo. App. 538.

³ See § 14.

⁴ See § 110.

⁵ Kehlenbeck v. Norddeutscher Bund, 10 Daly (N. Y.) 447; Harrington v. Workingmen's Society, 70 Ga. 340; Grosvenor v. Society, 118 Mass. 78.

power of making by-laws binding upon all the members of a corporation, whether it resides in the majority of the body at large, or those present at a corporate meeting, or be confined by charter to a select class, is in trust for the benefit of the whole, and must therefore be exercised with discretion.¹ In *Coleman v. Knights of Honor*,² the court intimates that a member of an incorporated society may not complain that a by-law duly passed by the society is unreasonable, but this is clearly against both principle and authority. In *People v. Board of Trade*,³ the doctrine is laid down that a court will not interfere with the enforcement of the by-laws of a society incorporated for the purposes of religion, morality, benevolence or amusement, but this case is neither in harmony with the general current of authority, nor with prior and subsequent decisions of the supreme court of Illinois. Where an unincorporated society becomes incorporated under a general law, the provisions of its constitution and by-laws become subject to the rules of law governing the provisions of the constitution and by-laws of corporations. While a society remains unincorporated it may make such rules and regulations as may seem proper for the discipline of its members, but as soon as it becomes incorporated, it surrenders this power, and becomes subject to the visitorial power of the courts. In such cases, therefore, provisions of the constitution and by-laws which were binding upon the members so long as the society remained unincorporated, may become null and void by the very fact of incorporation. The court will on proper application determine whether such provisions are reasonable and necessary to effect the object for which the society was incorporated.⁴ Whether a by-law is reasonable and consistent with the law, is a question solely for the court to determine.⁵ A by-law will not be set aside as unreasonable if there is any equipoise of opinion in the matter; its unreasonableness must be demonstrably shown.⁶ A by-law will not be held to be unreasonable merely

¹ Ang. & Ames on Corp. § 347; *Carrigan v. Society*, 3 Daly (N. Y.) 20; see § 110.

² 18 Mo. App. 189-194.

³ 80 Ill. 134.

⁴ *State v. Medical Society*, 38 Ga.

⁵ *People v. Throop*, 12 Wend. 186; see 10 Wend. 100 and 5 Cowen 465; *Commonwealth v. Worchester*, 3 Pickering 461.

⁶ *State v. Exchange*, 2 Mo. App. 96.

because it causes some inconvenience to the members. All by-laws are apt to do that, and the fact that the by-law has been permitted to remain in force for some time is evidence that it is not seriously inconvenient.¹ A by-law need not recite that it is necessary, as such necessity is implied; and in a declaration for the penalty of a by-law, its necessity need not be alleged.²

A by-law is reasonable which provides that a member shall be entitled to relief, in case of disability or sickness, only from the date of his application for such relief, and not from the time such sickness or disability occurred. While in individual cases such a by-law may work a hardship, on the other hand, it is necessary for the society to make fixed and certain rules to prevent imposition on the society, either by feigned or trivial sickness, or by disability produced by causes not entitling the claimant to relief. It is necessary that the society should have information of the state of the applicant, and have it in its power to visit him, and inspect personally his situation.³ A by-law providing that the officers of the society shall withhold benefits when intemperance, debauchery, etc., are the cause of sickness, and providing that when death is caused by intemperate use of alcoholic liquors, or by debauchery, the beneficiary shall not be entitled to the fund, is reasonable and valid.⁴ Such a regulation is not a determination of the right of the member or his beneficiary. A trial of the claim may be had to determine these rights under the by-law. A society may, by by-law, prohibit its members from indulgence in vices which multiply disease and death among them and thus diminish its general fund and increase the burden of assessments upon contributing members. Such provisions are not merely to regulate behavior, but strike at acts which will result in injury to the society. Where sick benefits are merely lost by reason of intemperance, membership remains in the society. A by-law providing that sick benefits shall be paid only upon presentation of a physician's certificate of the character and duration of the illness, is reasonable, as is also a by-law providing

¹ *Rex v. Ashwell*, 12 East 22.

² *Tuttle v. Walton*, 1 Ga. 43; *Coates v. Mayor, etc.*, 7 Cowen 585.

³ *Breneman v. Association*, 3 Watts & Sergeant (Pa.) 218.

⁴ *St. Mary's Soc. v. Burford*, 70 Pa. St. 321; *Harrington v. Society*, 70 Ga. 340.

that no benefits shall be paid unless the sickness is reported to the "sick committee" for investigation and report to the society.¹

A by-law of an incorporated society provided that any member who should be three months or more in arrears for dues, should be deprived of benefits for three months after liquidating the same. The court held, that this by-law was unreasonable and void, and in discussing the question said: "Is the by-law referred to unreasonable? I think it is most decidedly so. If it provided that delinquent members should be deprived of benefits during their delinquency, it would be otherwise; but this by-law subjects the member to a quasi penalty after the payment of his dues and the performance of his duty, and for a prospective period of three months. * * It is not only unreasonable, but oppressive and detrimental to the interests of the corporation, and one which, being fully understood, it seems, would prevent persons from becoming members of the society."² A by-law of an incorporated society declared that "vilifying any of its members" was a crime against the society, and provided that for such vilification a member might be removed from office, fined, or expelled from the society. The object of the society was for the relief of members in case of sickness and misfortune, and to assist distressed Irishmen emigrating to the United States. The court held the by-law unreasonable and unnecessary for the accomplishment of the end in view, declared it void, and in the opinion said: "Every man who becomes a member looks to the charter; in that he puts his faith, and not in the uncertain will of the majority of the members. The offense of vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment can not be necessary for the good government of the corporation."³ In *People ex rel. v. The Medical Society*,⁴ the court held that a society chartered merely for the promotion of medical science had no right to

¹ *Harrington v. Society*, *supra*; *Atl. Rep.* 1062; *Brady v. Association*, *Van Poucke v. Society*, 63 Mich. 378; 14 N. Y. Supp. 272.

² N. W. Rep. 863.

³ *Commonwealth v. Society*, 2 Bin-

⁴ *Cartan v. Society*, 3 Daly (N. Y.) *ney* (Pa.) 441.

20; see *Pentz v. Ins. Co.*, 35 Md. 73; ⁴ 21 Barb. 571.

Sherry v. Union, 139 Pa. St. 470; 20

decide what fees its members should charge for their professional services, and to expel a member who had disregarded such a regulation. The court said: "Can it be said with any plausibility that the establishment of a tariff of prices for medical services was a legitimate object of the creation of the corporation, or that it was necessary, or in any degree contributed to the accomplishment of the purposes or objects for which the law authorized the corporation?"

The charter of the Board of Trade of Chicago provides that the corporation shall have the right to admit or expel such persons as it may see fit, in manner to be prescribed by the rules, regulations or by-laws thereof. Under this power it adopted the following by-law: "In case any member of the association, having made any business contract, either written or verbal, shall fail to comply promptly with the terms of such contract, he shall, upon the representation of an aggrieved member to the board of directors, accompanied with satisfactory evidence of the facts, be by them suspended from all privileges of membership in the association until such contract is equitable or satisfactorily arranged or settled, when he may be restored to membership." The court held this by-law to be reasonable, and said: "It (the charter) gives the power of expulsion, and under that power the corporation has adopted this by-law, providing that if a member fails to comply with a business contract made with another member, he shall be expelled. This is somewhat different from the adjustment of disputes which are properly referable to the committees of reference and arbitration. It applies to cases of non-compliance with contracts about which there is no dispute necessary to be referred to one of these committees, as there was none in the present case. It certainly can not be said that this rule was not germane to the purposes for which the corporation was created. In our judgment, though it might sometimes operate harshly, it is well adapted to secure the object we have above named, and preserve the high character and credit of the Board."¹ A by-law of a chamber of commerce prohibiting its members from "gathering in any public place in the vicinity of the Exchange Room" and "forming a market" for the purpose of making any trade or contract for the future delivery

¹ People v. Board of Trade, 45 Ill. 112.

of grain or provisions, before the time fixed for opening the Exchange Room for general trading, or after the time fixed for closing the same, daily, is not unreasonable, or an unlawful restraint upon trade.¹ Under the peculiar facts surrounding the organization and maintenance of the Baltimore and Ohio Employes' Relief Association, it was held that a clause of the constitution of the association, providing that before the association will pay the beneficiary of the member killed the amount of benefits due, the person legally entitled to damages for his death shall release the Baltimore and Ohio Rail Road Company from all claims for damages, was held not to be so unreasonable that a court could declare it void.² A by-law of an incorporated benefit society, providing that any member who shall enlist as a soldier, or enter on board any vessel as a seaman or mariner, shall thenceforth lose his membership, is valid and reasonable, in view of the purposes of the organization, and "is not forbidden by any principle of public policy."³

A by-law of a mutual benefit society, providing that the sending of a notice of assessment or annual dues by mail shall be a legal and sufficient notice, whether in fact the notice is ever received by the member or not, is reasonable and valid. Such terms are neither harsh nor unfair. The great mass of commercial and financial business of the country is done through the mail, and it is not an unreasonable condition that notice so sent shall be considered duly served.⁴ The constitution and by-laws of a society requiring an applicant for membership to be initiated in addition to paying his proposition fee and being elected, before acquiring any rights as a member, are reasonable, and not contrary to law, notwithstanding the ceremony of initiation is secret.⁵ It may on first impression seem to be drawing too fine a distinction to say that a provision, which in a by-law of a corporation would clearly be

¹ State v. Milwaukee Chamber of Commerce, 47 Wis. 670. App. 107; Union Mutual v. Miller, 26 Ill. App. 230; Greely v. Iowa Ins. Co., 50 Iowa 86; Lothrop v. Greenfield

² Fuller v. B. & O. Ass'n, 67 Md. 433; 10 Atl. Rep. 237; Owens v. B. & O. R. R. Co., 35 Fed. Rep. 715. Mutual, 83 Mass. (2 Allen) 82; Epstein v. Mutual Association, 28 La. Ann. 938; see §§ 289-291.

³ Franklin v. Commonwealth, 10 Barr (Pa.) 359.

⁵ Matkin v. Supreme Lodge, 82

⁴ Forse v. Supreme Lodge, 41 Mo. Texas, 301; 18 S. W. Rep. 306.

invalid against its members, may nevertheless be a valid and binding clause in a special contract between it and any one of its members. But it is well settled that the by-laws of a corporation must be of a general nature, having reference to the objects of its organization. They are usually passed without the knowledge or consent of a large majority of the members and by those who may not be so watchful of the individual interests of each member as of the interests of the corporation as a body. Special contracts will be enforced against those who voluntarily and fairly enter into them, but the law will relieve a member from a by-law which is unreasonable or oppressive. "A man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent or perhaps knowledge, by those who do not consult his individual interests."¹

§ 24. **Alteration, amendment and suspension of by-laws.**—Neither the majority of the members nor the board of directors have a right to disregard a by-law which has been properly passed.² If it is objectionable it should be repealed or amended in the manner prescribed in the laws of the society. An incorporated society possesses inherent power to alter, amend or suspend its by-laws, provided that in doing so it does not interfere with vested rights. Subject to the same proviso, an unincorporated society may alter, amend or suspend its by-laws in the manner and to the extent set forth in the contract of association. No member of a society has any vested right in the fund, where its articles of association provide that under certain circumstances and conditions the society will look into his claim, and grant him such relief as shall appear just and reasonable; and the society may, in the manner prescribed, change its rule for the disposition of its fund, and make a new rule wholly different from that which before existed.³ A member of a society does not stand in the relation of a creditor to the society, and he can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief. A by-law of a society provided that

¹ Ang. & Ames on Corp., § 342; ² § 97.
Goddard v. Merchants' Exchange, ³ Stockdale v. School District, 47
9 Mo. App. 290; 79 Mo. 609; Austin Mich. 226.
v. Searing, 16 N. Y. 112.

a member who was taken sick, or otherwise disabled from following his usual or other employment, on application should receive five dollars a week. In October, 1876, the following by-law was passed, according to the rules of the society: "Be it resolved, that we suspend the weekly payments of benefits to the sick members until there is \$800 in the treasury." Plaintiff was a member at the time of the adoption of this by-law, and had been long prior thereto. He became sick in January, 1877, and so continued until March 17, 1877. The court held that this latter by-law was binding upon the plaintiff, and that he was not entitled to sick benefits unless there was \$800 in the treasury.¹ In 1849, plaintiff became, and ever since had been, a member of Hudson City Lodge of Odd Fellows. The constitution and by-laws which were signed by plaintiff provided that during the sickness of a member qualified to receive sick benefits, he should receive, if he had attained the scarlet degree, four dollars per week after the first two weeks. The constitution also provided that the lodge might make, alter or amend its by-laws, and the manner of doing so was pointed out in the by-laws. July 9, 1878, the by-laws were regularly amended, so as to reduce the benefit of a brother who had been sick for twelve months, to one dollar per week. The plaintiff was taken sick October 5, 1875, and continued so until the commencement of this action. He was of the scarlet degree, and entitled to receive sick benefits. He was paid four dollars a week down to July 9, 1878, and after that date one dollar a week. He brought suit to recover an additional three dollars a week from July 9, 1878. The court held that as the only contract between the plaintiff and the lodge was contained in the constitution and by-laws, they should all be considered together; that the lodge had the right to alter the by-law fixing the amount to be paid to sick members, after the plaintiff was taken sick, and that he could not receive the amount prescribed by the former one.² The view taken by the court in this case was that this by-law did not seek to deprive members of any rights which might have been acquired

¹St. Patrick's Society v. McVey, ²Poultney v. Backmann, 31 Hun 92 Pa. St. 510; see also McCabe v. 49, overruling 62 How. Pr. 466 and Father Mathew Society, 24 Hun 149. 10 Abb. N. C. 252.

under the former by-law; it was not intended to be retroactive. The society acknowledged its liability under the former by-laws, and paid the sick member according to its terms. The new by-law was a proper one for the society to pass, and it was binding for the future upon all its members whether they were sick or well at the time of its passage. A member is bound by proper by-laws legally passed, whether he is sick or well. If the society had sought to give the by-laws a retroactive force, and to deprive him of three dollars a week for any time he had theretofore been sick, it would have been null and void. The by-laws of a society provided that a member should, in case of sickness or accident, by which he was incapacitated from following his business, be entitled "to receive \$10 per week, to take effect from the day of such notice." A member became sick on January 1, 1883, and the society paid him \$10 per week from that day to December 1, 1883. The general laws of the state and the by-laws of the society gave to the corporation the right to repeal, alter or amend its by-laws, and on April 24, 1883, the following by-law was adopted by it: "If any member, after the adoption of this section shall have received benefits continuously for six months, or shall have received benefits to the amount of \$260 within a period of time not exceeding twelve consecutive months, the payment of further benefits to such member shall thereafter cease." Although the member's incapacity continued after that date, the society refused to pay him after December 1, 1883. The member claimed that the by-law giving a right to benefits constituted a contract which could not be changed, during his illness, so as to affect him. But the court referred to the power given to the society by the laws of the state and its by-laws, and said: "In view of this power to alter the contract, it can not be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term "vested right" is often loosely used. In one sense every right is vested. If a man has a right at all, it must be vested in him; otherwise how could it be a right? The moment a contract is made a right is vested in each party to have it remain

unaltered, and to have it performed. The term, however, is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now a right, whether it be of such a fixed character or not, must be a right to something; and, when a man talks vaguely of his vested right, it conduces to clearness to ask: 'A vested right to what?' In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. Nor has he a right to remain unaffected by any change that may be made; for, if such right be common to all the members, it is merely another way of saying that no change can be made; and, if the right be not common to the other members, it would be to assert a privilege or superiority over them of which there is no pretense. If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in other words, to such sums as became due before the new by-law was adopted. To express it differently, the change could not be retroactive. This is all that we think can be meant by 'vested right' in a case like the present. Now, under the contract, nothing was due before the sickness actually took place. Benefits do not accrue for future sickness. The right of the plaintiff to benefits for future sickness is not different in its nature from the right of the well members to benefits for future sickness. In the one case the members have a right to future payment in case they become sick; in the other, the plaintiff has a right to future payments in case he continues sick. And if there was no power to change the by-law in the one case, there was no power to change it in the other, which is equivalent to saying that there was no power to change it at all. The cases where a specific sum becomes due upon the happening of a certain event, as upon death, are not like the present. In such cases an alteration in the contract can not be made after the fact; for that would be to make that not due which had already become due. We are inclined to think that the foregoing would apply if the by-law under consideration had specified that the weekly payments were to continue as long as the sickness con-

tinued. But it does not so specify. The time during which the payments were to continue is left indefinite. The substance of the contract is, in our opinion, that, in case of sickness, the member is to receive weekly payments for an indefinite period of sickness, subject to the power of the defendant to change the provision authorizing such payments, so far as future payments are concerned.”¹

In another case it was said: “Some time after the defendant society became liable to the plaintiff for dues at the rate of \$2.50 per week, and after it had paid them for more than one year, it proceeded to amend its by-laws so as to reduce the amounts of benefits. This was certainly an easy mode of relieving the society from an obligation, and, if successful, will doubtless be followed by other similar associations. The difficulty in the way of this convenient mode of paying debts is that it is repudiation pure and simple. The argument that the plaintiff, being a member of the society, is bound by the by-law, does not meet the difficulty. It may be a good by-law as to future cases, but at the time it was passed the plaintiff was something more than a member. He was a creditor whose rights had previously attached, and those rights can not be swept away by such a scheme as this by-law.”²

In another case it was held that an amendment to the by-laws of a mutual benefit society, providing for the payment of stated benefits for sick members, which reduces the amount of such benefits, does not affect a right to such benefit, which had become vested by the sickness of the member before the adoption of such amendment, although made by virtue of a by-law in force when such member joined the society, permitting the amendment of any by-law. By one of the by-laws of the society, sick members were entitled to receive three dollars per week, *while unable to pursue their usual business*. In October, 1881, Pellazzino, a member, became insane, and so remained. By the original by-laws of the society, the usual right to amend them was reserved; and on October 31, 1882, an amendment was duly adopted, limiting benefits to sick members to thirteen weeks in each year. The only question in the case was whether the rights of Pellazzino to benefits

¹ Stohr v. Society, 82 Cal. 557; 22 Pac. Rep. 1125.

² Becker v. Society, 144 Pa. St. 232; 22 Atl. Rep. 699.

during his then existing inability were affected by this amendment. He was not present at, and did not agree to its adoption. The court thought that his rights were not affected by the amendment and said: "A right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events, if they continue to pay their dues until such events happen; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a contract depending on a contingency, becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt, any more than the reserved right of a legislature to repeal the charter of a corporation gives it the power to confiscate its property. The rights of Pellazzino as a member, including his contingent right to benefits, were subject to modification, whether he consented at the time or not; his rights as a creditor, when by falling ill he became one, this contingent right so becoming fixed, are not made so by the language of the contract between him and defendant, and therefore can not be surrendered except by his consent."

In an action upon the by-laws of an incorporated society, it appeared that, on the 1st of November, 1877, plaintiff was in arrears to the society for dues, but on November 14, 1877, he discharged the indebtedness. On December 14, 1877, plaintiff fell sick and became entitled to benefits. These were not paid, and on February 3, 1878, a by-law was passed declaring that a person in arrears should not be entitled to benefits until three months after the deficiency should be discharged. The society claimed for the by-law a retroactive force, and refused to pay benefits for sickness within three months from November 14, 1877. The supreme court of New York held that the benefits due for the sickness from December 14, 1877, to February 3, 1878, were a legal debt from which it could not relieve itself by making a new by-law; that the by-law passed February 3, 1878, could not visit a punishment upon plaintiff for a fault committed months before it was enacted.² A by-law of a society contained this provision: "Upon the death of

¹ Pellazzino v. Society, 16 Cin. Law N. Y. Weekly Dig. 17; 29 Hun 674. Bull. 27. Not reported in full in Hun's reports.

² Coyle v. Fr. Mathew Society, 17

one who has been a member of the association for six months last prior to his death, his widow shall be entitled to receive the sum of four dollars monthly during widowhood." A member who had been such for more than six months immediately prior to his death, died, leaving a widow surviving him. At the time of his death, and during his membership in the society, there was a by-law of the society as follows: "A revision or alteration of the articles of the association can be had at a general meeting of the members thereof by a majority of the votes of the members present." Subsequent to the death of the member, the by-law first set forth above was revised in conformity with the by-law concerning revisions and alterations, and was made to read as follows: "Upon the death of a member each person who may be a member of the society shall pay to the widow of the deceased member the sum of one dollar." The widow sued upon the original by-law for the arrears due at the bringing of the suit, claiming that she was entitled to four dollars per month, and that the revised by-law did not affect her rights. The court said: "The main question is, whether the allowance to the plaintiff was not cut off by the adoption of the new article after the death of her husband. It does not attempt to do so by any language which points to such a result. It is not in form retroactive, and, upon familiar rules of interpretation, ought not to be so construed as to cut off rights already fixed.

"It must be conceded, I think, that the provision in favor of the plaintiff was, in all respects, binding as a contract between her husband and the association. The association undertook to pay to his widow a monthly allowance after his death, if, at the time of his death, he was a member, and had been such member for the preceding six months. After his death, it is not perceived how the association can, by adopting a new article, or by repealing the old one, relieve itself from this obligation. But, independent of this consideration, it is safe to say that the new article does not, in form or substance, attempt to repudiate its obligations when they had already been fixed by the death of one of its members."¹ In 1862, a person became a member of a voluntary association. The by-laws of the association then provided that members paying the regular assess-

¹ Gundlach v. Association, 49 How. Pr. 190.

ments should be entitled to twenty-five cents per day during their sickness; that the society would pay twenty-five cents per day to the widow of each member, so long as she remained a widow; that the by-laws might be amended in conformity with certain specified rules. In 1868, said association was incorporated by act of the legislature, which provided that it might alter or change its by-laws. The by-laws in force at the time of the passage of said act were continued in force till August, 1869, when the society adopted new by-laws, wherein it was provided that such widows should receive twenty-five cents per day, until they had received \$200. Prior to the amendment of the by-laws, on January 5, 1869, the member died, leaving his widow surviving him. She was paid \$200 in all by the society, and, upon the failure to pay her twenty-five cents a day after she had received the sum of \$200, she brought an action for about \$200 against the society, being the arrears due her at the rate of twenty-five cents a day from the time she had received the \$200, as provided in the amended by-laws, to date of bringing the action. The court held that the society had the right to amend its by-laws as set forth, and that the widow, having received \$200, was precluded from further recovery. In its opinion the court said: "The regulation limiting the widow's share in this charity to \$200, was made by a general law, and applicable to all; and there is no suggestion of fraud, or that the regulation was not wise and salutary. We think the society were competent to make this by-law; and having fully performed the duty imposed, the plaintiff can not recover. But in this case there was an express provision in the constitution of the society that the by-laws might be changed, and the manner of doing it was specifically pointed out; so that the husband voluntarily became party in an association, and contributed his money with full knowledge of all the provisions in the articles of association, and fully assented to the same. There is no good reason, therefore, for claiming that the widow had a vested right which the society could not modify."¹

¹ *Engure v. Mutual Society of St. Joseph*, 46 Vt. 362. The reasoning can not be doubted. But to hold in this opinion is all to the effect that that a by-law may be changed by the a society should have the right to society after the member has per- change its by-laws in accordance formed his part of the contract, and

§ 25. Even though a certificate of membership in a mutual benefit society contains upon its face the explicit statement that the contract of insurance evidenced thereby is subject to its by-laws and to any amendments thereto which may thereafter be made, it is subject to the implied condition that any subsequent amendment shall be reasonable; and any amendment which entirely changes the scheme of insurance, and makes a radical departure from the fundamental plan, is not a reasonable exercise of the reserved power of amendment. An amendment designed to perfect, in matter of form and detail, the original plan, will, if otherwise unobjectionable, be within the terms of the contract, but one calculated to defeat or destroy that plan, or to substitute for it some other and essentially different scheme, will be an abuse of the power, a violation of the contract and an unreasonable and invalid amendment. In most cases it is easy to determine whether the change in the by-law is a mere matter of detail or whether it affects the principle of insurance on which the society is based; but occasionally a society finds that it must make some changes in the terms of its contract; that it must form new classes of certificate holders, even though the result is that persons are thereby induced to leave other classes and join the new one, or that it must in some way reduce the benefits and advantages promised in its original plan, and it is in these cases that the difficulty arises of determining whether there has been such an abandonment of the original scheme as is unreasonable and invalid. Where a society has contracted that certain advantages shall be given from the guaranty fund to all members who have paid their assessments for a certain number of years, it is clear that it may not, as the time approaches for the continuing members to receive these advantages, pass an amendment to its by-laws declaring that no part of the guar-

died, and when his beneficiary is the fragile and illusory obligations calling upon it to perform its part of the contract, is to sanction the repudiation of a debt. If a society may repudiate its part of the contract in the manner above stated, the contract of insurance issued by it is a sham and a snare, and the sooner members of such societies are made aware of the fragile and illusory obligations for which they are paying out their money, the better it will be for them. Legislators may not pass laws which impair the express obligations of a contract, and mutual benefit societies should not be permitted to do so. *People v. Fire Department*, 31 Mich. 458; *Kent v. Mining Co.*, 78 N. Y. 159.

anty fund shall be used for that purpose. But the cases set out in the sections treating of the alteration and amendment of by-laws show how difficult it is to lay down any rules for guidance on this subject.

It has been held that a change by a society of its system of insurance, in good faith, under a reserved power of amendment, whereby the number of persons in a certain class is reduced by the creation of another class in which insurance is given on more favorable terms to persons under a certain age, and in which certificate holders are permitted to become members of the new class, and whereby the amount to be realized by an assessment upon the members of the old class is cut down by reason of withdrawals from that class, is not such a wrongful act or breach of contract as renders the society liable to the beneficiary beyond the amount which will be realized from such an assessment. But even if the depletion of the class mentioned constituted a breach of contract, the damages are too remote and conjectural, to form the basis of a recovery.¹

Where a certificate provides for its payment "in an amount to be computed according to the laws of the society," and these provide that the provisions in regard to the payment of such certificates may be changed at any time, a member is bound by a change made in such laws after the issue of his certificate and before the time for its payment.²

§ 26. Whether or not a member is bound by an amendment to the by-laws adopted after his contract of insurance was made, depends upon the terms of this contract, or upon his consent to the change. If the contract provides that he shall be bound by any such amendment, and it is properly passed, there is no reason why it should not be valid against him. In such a case, the change is not made in violation of the contract

¹ *Supreme Lodge v. Knight*, 117 Ind. 489; 20 N. East. Rep. 479. In this case it was said: "The duly chosen and authorized representatives of the members alone are vested with the power of determining when a change is demanded, and with their discretion courts can not interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only where there is an abuse of discretion and a clear, unreasonable and arbitrary invasion of private rights that courts will assume jurisdiction over such societies or corporations." *Crossman v. Ass'n*, 143 Mass. 435; *Hussey v. Gallagher*, 61 Ga. 86; see § 114.

² *Bowie v. Grand Lodge*, 99 Cal. 392; 34 Pac. Rep. 103.

but in harmony with it. Where the contract provides that the by-laws may be amended so as to affect its terms, the first and primary inquiry is whether the body which made the change has done all that was necessary to give it the right to act, or, in other words, whether that body had jurisdiction to proceed in the matter; and the next inquiry is whether the amendment was passed in accordance with the rules and by-laws.

Where the by-laws stipulate that members may alter or amend them by a majority vote of those present, provided all the members shall have had previous notice of the proposed alteration, by mail or otherwise, notice must be given to all the members in order that changes shall be binding upon those not present or present only by proxy. In such a case, where the by-laws in force when a member obtained his certificate are afterward amended at a meeting which he did not attend, such amendments are not binding on him unless it is affirmatively shown that the meeting was called in the manner provided by the constitution.¹

Where the by-laws of a society provide that no changes in the by-laws shall be made except at its annual meeting, and that none shall then be made unless two-thirds of the members present agree thereto, no change may be made except in the manner prescribed, and a change of the by-laws at the annual meeting, by a vote of less than two-thirds of the members present, is invalid, although, after the meeting is adjourned, enough other members to make up the requisite number request in writing to be permitted to record their votes in the affirmative.² The organic law of a society provided: "Every by-law, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereof shall from that time only cease to have force." A by-law of the society provided: "These by-laws, rules and regulations, and the plan and system of membership, may be annulled, amended or changed by a majority vote of all the di-

¹ Metropolitan Association v. Windover, 137 Ill. 417; 27 N. East. Rep. 538; 37 Ill. App. 170; see § 108.

² Torrey v. Baker, 1 Allen (Mass.) 120; Hochreiter's Appeal, 93 Pa. St. 479.

rectors at one of the regular meetings of the association." It was held that a by-law as changed by the board of directors ceased to exist after the next annual meeting, at which it was not confirmed.¹ Where there is nothing in the contract of insurance which, in terms or by implication, authorizes any change in its provisions or conditions, by-laws subsequently passed do not become a part of that contract. Of course, they may be made a part of it by the consent of the member, and where he acts under them, and clearly recognizes them as modifying it, he will be estopped to deny that he has consented to the modification. They become effective in this case by reason of his conduct, not by reason of their enactment. But a mere acquiescence in the validity, force and effect of by-laws passed subsequent to the issue of his certificate does not necessarily imply that he consents that they shall modify his contract. Where the change does not necessarily affect contracts which have been issued, it will be taken for granted from his acquiescence in them that he recognizes them as having their ordinary effect. Ordinarily, by-laws operate prospectively only, and it will be presumed that they are not intended to affect contracts already entered into. A member may know that certain amendments to the by-laws have been passed, or he may even vote for them, but it does not follow from this that he consents that they may have a retroactive force, and may modify a contract which he holds with the society.

After the issue of a certificate, a society passed this by-law: "Death executed by the hand, act or procurement of the member, whether voluntary or involuntary, sane or insane at the time, is a risk not assumed by the association." In commenting upon it the court said: "This by-law does not, except by mere implication, refer to the holders of certificates already issued. We ought not to construe this language so as to refer back and affect certificates then existing, but rather so as to affect those issued thereafter. The words 'not assumed by this association' should be construed to read 'will not hereafter.' Thus construed, the by-law would not cover the case of the certificate here involved. The fact that (the member) had notice of its passage could not enlarge its meaning."²

¹ Johnson v. Association, 2 Daily Record (Baltimore Cir. Ct.) 441.

² Northwestern Association v. Warner, 24 Ill. App. 359.

Where there is nothing in the original contract which, in terms or by implication, authorizes any change in its provisions or conditions, by-laws subsequently passed do not become a part of that contract. A member of a society was present at a meeting and voted for the adoption of a new article of the constitution providing that members should not be permitted to engage in extra-hazardous occupations, such as a car-coupler. The article was adopted, and afterward the member became a car-coupler and was killed while doing duty as such. There was nothing in the original contract which prohibited him from becoming a car-coupler, or which authorized any change in its provisions, and the new article was held to apply only to agreements made after its adoption, as it was not by its terms retroactive.¹

§ 27. It is a recognized rule in the construction of statutes that they shall be so construed as to give them a prospective operation only, and that they shall be permitted to operate retrospectively only where the intention to have them so operate is clear and undoubted. The same canon of construction should be applied to amendments and alterations of the by-laws of a society. They should not apply to or set aside acts already done under the sanction of the by-laws, unless it clearly and unmistakably appears that the authority adopting them intended that they should do so. It will be presumed that an amendment to the by-laws was not intended to affect a contract of insurance previously issued by the society.²

A certificate was issued on May 8, 1888, payable to such person as it should be assigned to by the member. The member at once assigned it and made it payable to his mother. On October 5, 1888, he was married. On October 17, 1888, the society duly and legally changed its constitution as follows: "Any brother desiring to make a transfer of his benefit policy can do so, in writing, on the back of his policy, and in the form prescribed for that purpose, to be attested to by the secretary of the lodge under the lodge seal. Should a second transfer be desired, a duplicate policy shall be issued by the grand secretary and treasurer, upon the return of the old

¹ Hobbs v. Association, 82 Iowa ² §§ 136, 137.

107; 47 N. W. Rep. 983; see Morrison v. Ins. Co., 59 Wis. 165; 18 N. W. Rep. 13.

policy. Where marriage is contracted after the issuance of policy, and said policy becomes payable through death, it shall be paid to the widow, or, in the event of her death, to their joint issue, if any, unless otherwise ordered. All transfers of benefit policies shall be recorded in the membership and policy register of the subordinate lodge and in the grand lodge." Proof of the death of the member was made and served January 1, 1889, by the mother of the deceased, but the society paid the fund to the widow. In the suit of the mother against the society it was expressly admitted at the hearing that the indorsement made by the member on his certificate at the time it was issued, was a sufficient designation of his mother as his beneficiary, under its then existing laws, and that the indorsement remained as it was made, but it was contended by the society that the amended constitution of October, 1888, designated a new beneficiary for the member. On this point the court said:¹ "There is nothing in the language of the section of the amended constitution under consideration evidencing an intention to give it a retrospective operation. It does not attempt, either in terms or by necessary implication, to abrogate or set aside designations of beneficiaries already made in conformity with existing rules, but it merely provides that 'unless otherwise ordered,'—that is, in the absence of any other designation,—the widow, if there is one, shall be the beneficiary. We see no reason why the words, 'unless otherwise ordered,' should be so construed as to require a new designation of a beneficiary after the adoption of the amendment, so long as a valid designation was already in existence. The words apply just as readily to a designation already made as to one thereafter to be made. If the convention which adopted the amended constitution intended to make the widow the beneficiary unless another designation should be thereafter made, it would have been easy to employ language which would clearly express that intention. But the words used being such as apply just as readily to a past as to a future designation, the provision should not be so construed as to set aside valid designations already in existence, but to simply mean that, if a member, after obtaining his certificate, marries, and the certificate becomes payable by reason of his death, his widow

¹ *Benton v. Brotherhood*, 146 Ill. 570; 34 N. East. Rep. 939.

shall become his beneficiary unless he has otherwise ordered; that is, unless there is in existence a valid designation of another beneficiary. Here the member had designated his mother as his beneficiary, and that designation remained in full force and unrevoked at the time of his death. This clearly constituted an order to pay the money to his mother, within the meaning of the amended constitution, and it follows that the money was payable to her, and not to the widow."

Members may contract in reference to laws of future enactment,—may agree to be bound by any future by-laws or amendments which may be passed by the society, as if they were existing at the date of the contract. They may consent that new by-laws or amendments shall enter into and form parts of their contracts, modifying or varying them. But the fact that a member has consented to be bound by future laws or amendments does not alter the rule that they will be given a prospective operation in the absence of a clear intent that they shall act retrospectively.¹ A contract expressly provided that the member should comply with all the laws, regulations and requirements which were or might thereafter be enacted by the society. He made a valid designation of a beneficiary who was not in any way related to him or dependent on him. Afterward the law relating to beneficiaries was changed, and read as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." He died without having designated a new beneficiary. It was contended on the part of the society that the above law was retroactive, and intended to annul the appointment of beneficiaries theretofore made, who did not belong to the classes specified in it; and that the contract of the member was to comply with and be bound by the laws of future enactment as if they were already existing. But it

¹ § 136; *Supreme Commandery v. N. Y. Supp.* 801; *Bowie v. Grand Ainsworth*, 71 Ala. 436; *Northwestern Lodge*, 99 Cal. 392; 34 Pac. Rep. 103; *Association v. Wanner*, 24 Ill. App. Hogan v. League, 99 Cal. 248; 33 359; *Hobbs v. Association*, 82 Iowa Pac. Rep. 924; *Stohr v. Society*, 82 107; 47 N.W. Rep. 983; *Morrison v. Cal.* 557; 22 Pac. Rep. 1125; *Mont-Ins. Co.*, 59 Wis. 165; 18 N.W. Rep. gomery Ins. Co. v. Milner (Iowa), 57 13; *Hutchinson v. Supreme Tent*, 22 N. Y. Rep. 612.

was held that the language of the law was wholly prospective in its operation, affecting the power to appoint beneficiaries after it was passed; that it applied to new members, of course, but only to such old members as changed their beneficiaries after its passage.¹

Retroactive by-laws are regarded as impolitic and unwise, and they may often be said to be unjust and oppressive. Although they may in a given case be valid, they will always be subjected to such a construction as will circumscribe their operation within the narrowest possible limits, consistent with the manifest intention of the society as indicated by the language used. When it can be avoided they will not be permitted to destroy the validity of a certificate and to deprive a person of all rights under it. In one case a member designated as his beneficiary a person who was not in any way related to him or dependent on him, as he had a right to do under the contract. Afterward the by-laws were changed so as to restrict the beneficiaries to the family or relatives by blood of the member or some one dependent upon him. From the time of the designation of his beneficiary to the time of his death, some months after the change in the by-laws, the member had no family or relatives by blood or any one dependent upon him. The court, assuming that the by-law was retroactive under the peculiar terms of the contract, held that it was addressed retroactively only to those who could comply with its terms; that it did not apply in the case before it, and that the beneficiary was entitled to the fund.²

§ 28. **Repeal of by-laws.**—It is evident that the power to enact by-laws implies also the power to repeal them, and every by-law may be repealed by the same body which made it.³ A by-law which can be passed only by a two-thirds vote, may not be rescinded by a bare majority;⁴ but a by-law, requiring a two-thirds vote to alter the by-laws, may, nevertheless, be repealed by a majority. Voluntary societies frequently make

¹ *Wist v. Grand Lodge*, 22 Oregon, 271; 29 Pac. Rep. 610; citing *End. v. Nelson*, 18 Vt. 511; see § 114.

Interp. Stat. § 273; *Sedgw. St. & Const. Law*, 161; *Hedger v. Renaker*, 3 Mete. (Ky.) 258.

² *Wist v. Grand Lodge*, 22 Oregon 271; 29 Pac. Rep. 610.

³ *Rex v. Ashwell*, 12 East 22; *Smith v. Nelson*, 18 Vt. 511; see § 114.

⁴ *Stockdale v. School District*, 47 Mich. 226.

constitutions and pass by-laws and declare that they may not be altered or amended except in a certain mode or manner, as by a two-thirds vote, or by votes to be taken at two different meetings. In such cases, alterations or amendments must be so made. But their constitutions and by-laws may at any time be altered or abrogated by the same power which created them; and the vote of any subsequent meeting altering or abrogating them, though passed only by a majority, has as much efficacy as a previous vote establishing them.¹ In a corporation the power to enact by-laws is continuous, and no one has a right to presume that by-laws will remain unchanged. They may be changed whenever the welfare of the corporation requires it and the change is not forbidden by its organic law.²

¹Smith v. Nelson, *supra*; Richard-
son v. Union Society, 58 N. H. 187; Ind. 489; 20 N. East. Rep. 479.
Commonwealth v. Mayor of Lan-
caster, 5 Watts 152; see § 105.

²Supreme Lodge v. Knight, 117

CHAPTER IV.

MEMBERSHIP.—PART I.

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§ 29. **Admission into incorporated societies.**—As the power of admitting new members is incidental to an incorporated society, it is not necessary that such power be expressly conferred by the statute under which it is organized, or by its charter. When the organic law of the society and its charter are silent as to its powers in this regard, the society may admit to membership any number of persons; but when such law or charter limits and restricts the power of admission to a particular number, it erects a barrier beyond which the society may not pass. Where the charter of a society provides that it shall consist of not more than one hundred active members, and may bestow honorary membership on active members under such regulations as may be prescribed, the society may not create honorary members, except from active members. And when, in such case, the active membership has reached one hundred, the election of “contributing” members in the

same manner as active members, is void as being evasive of, and conflicting with its charter, even though the privileges of such "contributing" members be greatly limited.¹ Where the statute of a state under which a mutual benefit society is organized, requires that all members shall be citizens of that state, and, of course, of the United States, a clause in the charter of such society, authorizing persons who have declared their intention to become citizens of the United States to become members, is illegal.² Where the articles of incorporation prescribe the conditions of membership, no additional restrictions may be imposed, without amending the articles.³

It may be stated, as a general rule, that when a person has applied for membership in an incorporated society, and has been refused admission, he is without remedy to compel the society to admit him. It would be manifestly unjust, and destructive of the harmony and efficiency of such societies to compel them to admit persons into the societies merely because they possessed the qualifications set forth in the organic law. These qualifications are necessarily expressed in very general terms, and do not take into consideration many elements of character which do, or do not, make persons desirable associates and members. The succession of membership in the corporation is to be kept up by the election of proper members by those already admitted to membership, and, to the members clothed with this power and duty, the law gives the right to judge of the qualification necessary for membership. Not only are the relations between the society and its members voluntary on the part of the latter, but, as a corollary to this principle, no person is required to become a member. Having never been admitted to the right of enjoyment of the property of the society, or to any interest therein, and being under no obligation to take upon himself the privileges and duties of membership, the excluded applicant has received no legal injury, and the courts have no jurisdiction to interfere, even though the exclusion may seem to be the result of malice and arbitrary injustice. This power to determine whether an applicant possesses the qualifications necessary to entitle him

¹ *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291.

² *Alsatian Beneficial Society*, 35 Pa. St. 79.

³ *People v. Society*, 41 Mich. 67.

to membership in the society, is judicial in its nature; and, in determining this question, the society affects no civil or property right of the applicant; there is nothing, therefore, to invoke the visitorial power of the courts over the society. This rule is not changed by the fact that the applicant claims to have been a member of a society with similar objects and a similar name. A man who claims to be a Mason may not invoke the aid of a court to compel an incorporated society of Masons to admit him to membership in that society. The courts will not undertake to determine, as to this person, or that, whether he is a Mason, an Odd Fellow or a member of any organization, and whether, as such, he ought to be admitted to fellowship with an incorporated society of Masons, Odd Fellows, etc. These matters must be judicially determined by the society itself. This power of judicial determination of the qualifications of an applicant for membership is inherent in the society, and exists whether recognized in its charter, or not.¹ But where the law provides for the formation of a society for objects of public benefit, and makes it the duty of a certain class of citizens to become members of the society, in order to enjoy certain privileges granted by the laws of the land, an entirely different case is presented. It is evident that such a society is not voluntary. A duty is imposed, and a privilege conferred upon a certain class of citizens, and the visitorial power of the court may be invoked to inquire into the exclusion of an applicant from the rights and duties of membership. When a party having a clear presumptive title to its enjoyment applies to be admitted to the exercise of a franchise in such a society, the application should not be denied, unless the right of immediate expulsion, for causes then subsisting, be plain and unquestioned. The exclusion of such an applicant can be justified only by facts repelling the presumption that he was qualified for admission, or by extraneous facts, showing that, if his application had been granted, there were then subsisting causes, making a clear case for immediate expulsion.² Where the law made it the duty of the physicians of

¹ State v. Odd Fellows, 8 Mo. App. 148; Burt v. Grand Lodge, 66 Mich. 85; 33 N. W. Rep. 13; Connelly v. Association, 58 Conn. 552; 20 Atl. Rep. 671.

² Bagg's Case, 11 Coke 99; *Ex parte* Paine, 1 Hill 665; People v. Medical Society, 32 N. Y. 187.

each county in the state to form an incorporated medical society for that county, and provided that any physician who should not become a member of such society in his county, should forfeit his license, and become subject to the disabilities of unlicensed physicians, it was held that a licensed physician, having the qualifications prescribed by the by-laws, might proceed by *mandamus* to compel the society to admit him to membership, upon its refusal to do so. In the same case it was held that a licensed physician, having the prescribed qualifications, could not be excluded from the franchise, on the ground that, at a period antecedent to his application, he had advertised in the newspapers in a manner contrary to the conventional rules of the society. As he was not, at the time of the advertisement, a member of the society, he did not violate its law. "Where there is no law, there is no transgression." The court said: "Those who were members of the society could not lawfully be expelled for antecedent deviation from the code. Much less could such deviation be alleged as cause for exclusion against one who never agreed to be bound by it, and as to whom it was not merely an inoperative, but an unknown law."¹

§ 30. **Admission into unincorporated societies.**—Unincorporated voluntary societies come into existence by the mutual agreement of the persons forming it, and the privilege of membership is not given by statute, or derived through prescription, but is created and conferred by the organization itself. The law can not compel such a society to admit an individual to membership, and a person who has applied for admission and been excluded is utterly without remedy at law, however arbitrary and unjust he may regard the exclusion. Such societies may prescribe the conditions upon which persons may be admitted to membership, and they are the exclusive judges as to the existence of such conditions. The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members. No one can be compelled to join the society, or to remain a member against his wish, nor can the society be compelled to admit a person against its will. This principle is inherent in every voluntary

¹ People v. Medical Society, *supra*; Gay v. Farmers' Mutual, 51 Mich. 245.

society.¹ A person may become a member of an unincorporated voluntary society by paying in the prescribed amount of money, and by acting, and being treated and considered as a member, without signing the constitution, although the constitution provides that any person wishing to become a member shall sign it, if he is elected to membership.²

§ 31. **Election to membership.**—If there be no form prescribed for electing members, every candidate must be proposed singly. If the names of more than one were set down in a list, and the election was made of the whole list by a single vote, such election is altogether void, although the names may have been repeatedly read over, and an offer made to strike out any to which an objection should be made, and notwithstanding the election was by the unanimous consent of the entire body. For, it may be presumed that, instead of using his judgment as to the propriety of admitting an individual, which he would do in case they were separately proposed, each member, desiring to obtain the admission of some one in particular, may compromise his opinion as to the others, and thus, persons may be introduced who would otherwise have been rejected.³ If a person procure his election and obtain membership in a mutual benefit society by false representations and suppression of facts concerning his state of health at the time of his application, his admission to membership is void, and he may be expelled.⁴ A by-law of an incorporated society provided that the object of a special meeting should be stated in the call. Another by-law provided that a new member must be approved by a vote of the society. A warrant which called a special meeting of the society, contained no article for the admission of new members, but contained the article: "To transact any other business that may legally

¹ The right of a person, duly elected thereto, to sit as a new member of a democratic county committee, a voluntary unincorporated political association, provided for by the constitution of the democratic county organization, is one which the courts will not attempt to enforce. Plaintiff, not having been admitted as a member of the committee, and therefore not having acquired any rights in its funds, the alleged fact that it has a fund of \$4,000 does not give him any right of admission. *McKane v. Adams*, 4 N.Y. S. 401; 21 Abb. N.C. 459; 51 Hun 629; affirmed 123 N. Y. 609; 25 N. East. Rep. 1057.

² *Tyrrell v. Washburn*, 6 Allen (88 Mass.) 466.

³ *Ang. & Ames on Corp.*, § 126.

⁴ *Morel v. Society*, 13 Lower Can. Jur. 1.

come before said meeting." At this called meeting, several persons were admitted to membership, and permitted to vote. It was held that the election of such persons to membership was invalid.¹

§ 32. **Who are members of a mutual benefit society.**—The members of a society incorporated for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the family or heirs of deceased members, are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation, are entitled to the mutual protection and relief provided or whose family or heirs are, in case of death, entitled to the specific relief provided for them. The members of such a corporation are the elective and controlling body, authorized to elect trustees and other proper officers, and prescribe regulations for the government of the same.² Membership in a mutual benefit society is frequently limited to the members of certain subordinate organizations and is, by the by-laws, made to depend upon the continuance of membership in such organizations. When such is the case, a member who ceases to be a member of such organization, also ceases to be a member of the mutual benefit society. The fact that, after the withdrawal of the member from such organization, the society continues to carry his name on the roll of membership, to recognize him as a member, and to levy and collect assessments from him, gives him no rights against the society. Such acts on the part of the society do not operate as an estoppel, for the by-law setting forth the qualification of membership is as binding upon the member as upon the society, and, in such a case, the by-law declares that he is no longer a member.³ The society and the member may agree upon some method by which the question of his being and remaining a member of a certain organization shall be determined so as to be binding upon both; but in the absence of any such agreement, it will be presumed that these questions are to be decided by that organization. Where such an organization has an orderly system of laws governing

¹ Gray v. Society, 137 Mass. 329.

² Burbank v. Association, 144 Mass.

³ State v. Association, 38 Oh. St. 434; Springmeier v. Association, 5 Cin. Law Bull. 516.

the admission into and expulsion from membership, its act determining the status of a member will, in the absence of contrary provisions, be binding on a mutual benefit society, in which membership is contingent upon continued membership in that organization. The custom of a mutual benefit society to accept as conclusive a certificate of another organization stating that the person named therein is a member of that organization, or that he died while a member thereof, clearly indicates that it is a part of the contract that the officers or proper tribunal of the organization shall settle the question of membership in that body.¹ To prove that a person is a member of a society, it is competent to show that his name is on its records, or that he has stated that he was a member.² Receipts from the society for dues or assessments, demands upon a person for assessments, and including him in the list of members, are facts tending to show that he was at the time a member in good standing.³ But after a member has resigned, or been expelled, the mere fact that his name is carried on the rolls of the society does not continue his relations with it.⁴

Where by-laws provide that a member may at any time withdraw from the society by giving notice in writing of his intention to do so, a notice of withdrawal by him severs his connection with the society. No assent or dissent on its part is necessary.⁵ In an action on a certificate where the question of membership is in issue, evidence showing that the deceased was not a member of the society at his death is admissible, though his resignation or withdrawal is not specially pleaded.⁶

A by-law of a Masonic mutual benefit society, passed in view

¹ Connelly v. Association, 58 Conn. 552; 20 Atl. Rep. 671; but see Odd Fellows v. Hook, 10 Cin. Law Bulletin, 391. See Pfeiffer v. Mt. Ho-reb Encampment, 13 Daly 161; Vi-var v. Supreme Lodge, 52 N. J. L. 455; 20 Atl. Rep. 36; Burbank v. Association, 144 Mass. 434; Springmeier v. Association, 5 Cin. Law Bull. 516; Ellerbe v. Faust (Mo.), 25 S. W. Rep. 390.

Turnbull v. Payson. 95 U. S. 418; New Era Life v. Rossiter, 132 Pa. St. 314; 19 Atl. Rep. 140.

³ Bankers' Association v. Stapp, 77 Texas, 517; 14 S. W. Rep. 168; New Era v. Rossiter, *supra*.

⁴ Rood v. Association, 31 Fed. Rep. 62; Cramer v. Masonic Life, 9 N. Y. Supp. 356.

⁵ Cramer v. Masonic Life, 9 N. Y. Supp. 356; Borgraefe v. Supreme Lodge, 26 Mo. App. 218.

⁶ Dows v. Naper, 90 Ill. 44; Minneapolis, etc., v. Libby, 24 Minn. 327; Cramer v. Ma onic Life, *supra*.

of a by-law of the Masonic lodges excluding saloon keepers from the privileges of the lodges, and providing that any member becoming a saloon keeper shall forfeit his membership in the society, applies to those who are and continue, as well as to those who become, saloon keepers after its passage.¹

Where a by-law of a society provides that any member expelled from the Masonic lodge to which he belongs shall forfeit his membership in the society, such membership is forfeited by his being debarred, against his will, of the privileges of his lodge, though not in form expelled therefrom.²

Under laws, 1883, Chap. 175, of New York, providing for the incorporation of co-operative or assessment life and casualty insurance associations, and declaring each policy holder a member of the association, with a voice in the management of its affairs, only adult persons were contemplated as entitled to membership, as membership is founded on mutual contract between the members.³

¹ *Ellerbe v. Faust* (Mo.), 25 S. W. Rep. 390.

² *Ellerbe v. Faust*, *supra*.

³ *In re Globe Mutual Ben. Association*, 135 N. Y. 280; 32 N. East. Rep. 122; affirming 17 N. Y. Supp. 852. In so holding, the court said: "The defendant was a co-operative association under the act, a continuing membership in which is made dependent on the member keeping up his dues. Each holder of a certificate is, by virtue thereof, a member and corporator in the association, and so remains until by nonpayment of dues his membership is forfeited. The statute contemplates a meeting of the associates in annual meeting, at which reports of receipts and expenditures are to be submitted, and the associates, assembled at a meeting duly notified, are to consider and pass upon by-laws or amendments proposed for adoption. It is plain that the powers conferred upon members can not be exercised by children of tender years, such as have been permitted to become members of the

corporation defendant. The children insured by the defendant, whose ages are given in the schedule, were incapable of exercising any choice in becoming members, or of appointing a beneficiary, or of exercising the powers with which members are invested by the statute. They could take no part in the co-operative scheme upon which the corporation rests, and which implies the voluntary association of persons capable of acting in the administration of the affairs of the corporation. There is nothing in the statute which permits the inference that a child may be made a member of the corporation upon the application of the parent, or that a beneficiary may be designated or changed by any person except the member himself. It has been held that where a statute authorizes persons to form a corporation, it is implied that they shall be persons of full age. *Road Co. v. Townsend*, 13 Ont. App. 534; 16 Am. & Eng. Corp. Cas. 645. Infants admitted as members by the defendant

§ 33. **Membership in religious corporations.**—A right as a corporator in a religious society is obtained by a stated attendance on divine worship and contributing to its support by renting a pew, or by some other mode usual in the congregation. Such a right can not be derived by descent from the founders of the society, or from the former contributors to, or worshipers in it. The association between a religious incorporation and its incorporators is voluntary on the part of the latter, and is dissolved by their withdrawing from attendance on its worship, omitting to contribute to its support, and uniting in the establishment of another like incorporation. Aliens may be corporators and trustees in a religious corporation.¹ Membership in a church, however, is to be distinguished from membership in a religious corporation. The church is an unincorporated voluntary society, having power to adopt its own rules for admission. It is entirely independent of the religious corporation, and a person may, by stated attendance at public worship, and contributing to its support, become a member of the religious corporation, without becoming a member of the church, for whose wants the corporation provides. This distinction between membership in a religious corporation and membership in a church whose wants are supplied by the corporation, is an important one, and must be kept in view in determining the respective rights of membership.

§ 34. **Expulsion, amotion, suspension.**—Expulsion is the act of depriving a member of a society of his right of

became members of the corporation, if legally entitled to admission, and may be elected trustees or directors, and it might happen that management of the affairs of the corporation would become vested in persons who could not have organized it. We place our assent to the judgment below on the ground that it appears from a consideration of the statute of 1883, and the nature and object of co-operative insurance companies, and the relation which members hold to the corporation, that adult persons only were contemplated as entitled to membership. The law fixes an arbitrary period when persons become

clothed with general legal capacity, and while, in many cases, youths under twenty-one years of age are capable of exercising an intelligent judgment and might properly be admitted to the advantage of membership in a company like that of the defendant, in many others they would be wholly unfitted to act as members of such an organization. We think the order below is right, and it should be affirmed." But see *Chicago Mutual v. Hunt*, 127 Ill. 257; 20 N. East. Rep. 55.

¹*Cammeyer v. United Church*, 2 Sand. Ch. (N. Y.) 186; *People v. Tuthill*, 31 N. Y. 550.

membership therein, by the vote of such society, for some violation of his duty as such, or for some offense which renders him unworthy longer to remain a member of the same. In an incorporated society there is a distinction between what is called *amotion*, or the right to remove an officer, which is a power inherent in every corporation, and *disfranchisement*. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues to be a member; but disfranchisement is an actual expulsion of the member from the body, and the taking away of his franchise. This distinction is not generally regarded in the books, and the term "amotion" is frequently used as a synonym for expulsion. It is well, however, in view of the increasing importance of the subject of expulsion from voluntary societies, to preserve and recognize the distinction as laid down. Suspension is a temporary expulsion, and the law regarding the suspension of members from their privileges is in all respects the same as the law governing their expulsion from membership. While this is true, there is still a well defined distinction between suspension and expulsion. Expulsion severs the connection between the expelled member and the society, but suspension from membership, being the temporary privation of rights and benefits, does not otherwise affect the relation of the parties. The suspended member becomes entitled to his privileges by lapse of time, or by some act on his part, as the payment of dues, assessments or fines, etc.; but the expelled member may be readmitted only on the terms and conditions of a new member. It is evident, therefore, that a member's duty to the society, in the absence of contrary provisions in the contract of membership, remains undiminished during the time of his suspension. He must, during all of such time, perform all the duties required of other members, and he is liable for all dues and assessments levied under the by-laws. The deprivation of all privileges and benefits by suspension does not determine the liability of a member for such dues and assessments by removing the consideration necessary to support the contract to pay them. The consideration of any undertaking to pay them is his admission into the society as a member. While certain privileges and benefits are incident to membership, there are also certain conditions upon which the enjoyment of

them is made to depend. The suspended member is, then, subject to the duties of membership, even while debarred from the enjoyment of its rights and benefits.¹ It is sometimes argued that the power to expel a member implies the power to suspend him, on the principle that the greater includes the less. But the power to expel can not justly be held to include the power to suspend, for the suspension of a member might work great injustice, by depriving him of the benefits of membership, while leaving him subject to the payment of dues and assessments. Such a punishment should only be inflicted when it is provided for in the contract of membership, for the quasi-judicial powers of societies should be exercised in exact conformity with such contract.² The right to fine or expel, given in a contract of membership, does not include the right to suspend.

§ 35. **Power of amotion in an incorporated society.**—

Incorporated societies have inherent power to expel members in certain cases, and it follows that they have power to amove an officer of the society from the station to which he has been assigned, before the expiration of his term of office, when the interest and good government of the society require it. It is well settled that the inherent power of amotion may be exercised for three causes: *First*, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise. *Secondly*, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office. *Thirdly*, such as are of a mixed nature, as being not only against the duty of his office, but also indictable under the law. Before he can be amoved for the first offense above specified, he must have been convicted in the courts of the land. But if he has fled the country before conviction, he may be removed as if convicted. In case of a mere ministerial officer appointed to hold office during the pleasure of the appointing power, he may be removed at the mere pleasure of those appointing him, without notice or charges; and the appointment of a new officer to serve in his stead is a sufficient amotion of such an officer. But notice,

¹ Palmetto Lodge v. Hubbell, 24 S. C. (2 Strob.) 457.

² Schassberger v. Staendel, 9 Weekly Notes of Cases, 379.

and an opportunity to be heard, are necessary where the appointment is during good behavior, or for a specified time, or where charges are preferred against the officer. Mere acts, which are a cause for amotion, do not create a vacancy until the amotion actually takes place. Where the organic law of a society and its by-laws are silent as to the mode of proceeding in amoving an officer, reference must be had to the nature of the case to determine what course justice requires the removing power to pursue in exercising its jurisdiction. Where the statute under which the society is organized provides a cause for which an officer may be removed, it is not necessary that the cause assigned for removal should be stated in the precise language of the statute. If the charge substantially embraces the cause as set forth, it is sufficient.¹ The power of, and proceedings in amotion rest upon the same principles as in expulsion and will not be separately treated of at length.

§ 36. **Power of incorporated societies to expel members.—**

A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute, or exists by prescription, and, therefore, can not be taken away by the act of the corporation, except in certain extreme cases. As membership is a right conferred by statute, or derived from immemorial custom which implies the existence of a grant, it can neither be taken away by act of the corporation, nor withheld by the act of the corporation, from any one eligible to the enjoyment of it.² Where corporations are for business purposes, are founded upon private capital, and own property, the modern cases are very unanimous in holding that no stockholder may be disfranchised, and thereby be deprived of his interest in the property of the corporation, without an express authority for the purpose in the charter. There is a power of expulsion inherent in every incorporated voluntary society. But, as held by Lord Mansfield in the case of *Rex v. The Mayor of Liverpool*,³ and as has been held in a long line of subsequent cases, both in this country and in England, this

¹ *Peoples v. Higgins*, 15 Ill. 110. (N. S.) (N. Y.) 162; *People v. Medical*

² *Gay v. Farmers' Mutual*, 51 Mich. Society, 32 N. Y. 187.
245; *White v. Brownell*, 4 Abb. Pr. ³ 2 Burr. 723.

power is limited to three causes: *First*, offenses as a citizen against the laws of the land; when an offense has been committed, which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men. Such are the offenses of perjury, forgery, etc. But before an expulsion is made for a cause of this kind, it is necessary that the member shall have been convicted of the offense by a court or jury, according to the law of the land. *Second*, violation of duty to the society, as a *member and incorporator* thereof, such as the obliteration or alteration of its records, or acts tending to impair or destroy its title to its property, rights or privileges. In this case he may be expelled on trial and conviction by the corporation. *Third*, breach of duty in respect alike to the corporation and the laws. This is an offense of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land. In these cases the expulsion of the member is but the exercise of a power incident to the right of self-preservation. It has been laid down as a rule that offenses against corporate duty consist of "things done that work to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof."¹ As observed in one case,² this rule may be somewhat too restricted in some special cases, but it is the general and leading rule, and is rarely departed from. If the member does acts which are calculated to destroy the corporation, or its liberties and privileges, he may be disfranchised. He thus forfeits his right to membership. It is very clear that the character of the act considered as an offense against the corporation, depends materially upon the nature and purpose of the corporation itself. The duties of membership should be liberally construed with reference to the objects for which the society was incorporated. Such duties, according to Lord Mansfield, are tacit conditions annexed to the franchise of a member. Whether an act is a breach of corporate duty, or not, should be judged entirely by its effect on the objects of the society. Where a member performs an act in direct contravention of the purposes for which the charter was obtained, he may be expelled. The authority

¹ Ang. & Ames on Corp. 349; 2 ² People v. Medical Society, 24 Barb. Kent's Com. 297. (N. Y.) 571.

of an incorporated society to expel its members is a matter demanding the serious and careful consideration of the courts in each particular case. While the individual rights of those who are members should be carefully guarded and protected, and the courts should see that the powers conferred are not exceeded and abused, they should, at the same time, sustain any legitimate and proper action which may have been taken by the society, within the scope of its charter, to maintain and uphold the objects of its creation. Societies, clubs and voluntary associations of all kinds are increasing with great rapidity in this country, and the power of expulsion is naturally developing in its application to these widely different organizations. It seems to have been the policy of courts for many years to restrict the jurisdiction of societies over the rights of their members, but courts are now inclined to sustain the action of societies in expelling members for causes which tend to militate against their good government under their charters. Societies may set forth in their by-laws the offenses for which they will exercise this inherent power of expulsion, and if these offenses fall reasonably within the rule laid down in the preceding paragraph, the courts will hold the by-laws to be reasonable, valid and binding.

§ 37. **Development of the doctrine of the inherent power to expel—Modern doctrine.**—The rules just laid down constitute the modern doctrine on the power of expulsion of members from incorporated voluntary societies. A comparison of the modern rule with the early English cases will show the growth and development of this power under the liberal application of sound principles. The famous case of *James Bagg* was reported by Lord Coke.¹ In *Bagg's Case* it was held by the court of King's Bench that the power of expulsion, being judicial in its nature, must be exercised by the courts of the land in all cases, except where authority to expel its members was expressly conferred upon the society by its charter, or was derived by prescription, and that where no such express authority existed, there must be a conviction of some offense in a court of law before the offending member might be disfranchised. But in applying this rule, it was found to be too narrow and restricted to enable corporations

¹ 11 Rep. 93.

properly to govern their internal matters of discipline, and to attain the objects for which they were created, and afterward, Lord Mansfield held the doctrine to be as has been stated.¹ While the more modern cases have added no new causes for which the inherent power of expulsion may be exercised, the tendency is to hold the member to a rigid observance of his duty as a corporator, and to look with more favor upon the charge against a member, of breach of corporate duty.

§ 38. **Power of expulsion conferred by the charter.**—The power of expulsion for the three causes above specified being inherent in an incorporated society, any express power of expulsion for certain defined causes, conferred upon a society by its charter, is to be regarded as cumulative. A society may not expel members for minor offenses without an express provision of its charter conferring upon it that right; and a general provision that the society shall have power to expel its members, confers upon it no greater power than it inherently possesses. While a general provision in the charter, that the society shall have power to expel its members, in fact confers upon it no other or greater power than is inherent in it, the courts, in some cases, seem to be inclined to give a broader and more liberal construction to its powers when they are thus recognized in the charter. Where the charter confers upon a society the right to expel its members, under such rules and regulations as it shall adopt, this power may not be used in an arbitrary and unjust manner, and without regard to the objects and necessities of the society. When a person becomes a member of an incorporated voluntary society, he does so with reference to the main objects of its existence, as pointed out in the charter. When an offense is totally unconnected with the affairs and objects of the society, disfranchisement can not be necessary for the good government of the corporation. The authority is conferred for the purpose of enabling the incorporated society to accomplish the objects of its creation, and the power, in its exercise, is to be limited to such objects and purposes. But corporations inherently have the power of self-protection, and the right to do those things which are necessary to accomplish the objects of its existence, and, hence, it will be seen that these

¹ *Rex v. Richardson*, 1 Burr. 517.

general powers of expulsion, which are conferred upon societies, in reality add nothing to their inherent powers. Courts, in their desire to give to societies a sound discretion in determining what constitutes a breach of a member's duty as a corporator, have sometimes referred to the fact that, in the case at bar, the power of expulsion was conferred by the charter; but while this tendency to be liberal in defining the offenses which fall within the breach of a member's corporate duty is in the right direction, it can not rightly be placed upon the ground that the power of expulsion has been extended by any general recognition in the charter. It may be confidently stated that there is no instance in which the expulsion of a member, under the general power conferred by charter, has been sustained, where the offense did not, with a reasonable and liberal construction, come within the second cause for expulsion as above set forth, viz., a breach of the member's duty to the society. In Pennsylvania, where the approval of the supreme court of the state to the provisions of the charter is required before a society can become incorporated, it has been held that the court will not approve a charter for the incorporation of a society where the articles of incorporation contain an indefinite statement of the offenses for which a member may be expelled. The court refused to approve a charter which provided that "any member may be expelled, who commits any misdemeanor, or any other act which may prove injurious to his character or standing."¹ It refused to approve one which gave to the majority of the members the power to expel any member "guilty of any offense against the law,"² and one which gave to the society power to expel any member who should be "guilty of actions which may injure the association."³ In one case it was held that a charter should not be approved which provided that membership in the society should be forfeited by enlistment in the army or navy. The court said: "It is against public policy. A corporation which is a creature of the law ought not to proscribe its members for aiding the government which creates and protects it."⁴ But

¹ Butchers' Beneficial Association, 38 Pa. St. 293.

³ Butchers' Beneficial Association, 35 Pa. St. 151.

² Beneficial Association of Brotherly Unity, 38 Pa. St. 299.

⁴ *In re Society*, 10 Phila. Repts. 19.

it has been held that a by-law of an incorporated benefit society, providing that any member who shall enlist as a soldier, or enter on board any vessel as a seaman or mariner, shall thenceforth lose his membership, is valid and reasonable, in view of the purposes of the organization, and "is not forbidden by any principle of public policy."¹

§ 39. **Breaches of corporate duty.**—Where one of the objects of an incorporated society is to provide assistance and sick benefits for sick members, it is subversive of the fundamental objects of the society,—an act which tends to its destruction,—for a member to feign sickness, and draw money from the benefit fund on account of such feigned sickness, and the society has power to expel a member for such an offense.² Where the main object of an incorporated mutual benefit society is to furnish life indemnity, or pecuniary benefits to widows, orphans and heirs of deceased members, indemnity for accidents, sickness or permanent disability to members thereof, the non-payment of dues and assessments is subversive of the fundamental object of the society, tends to its destruction, and is a violation of the member's duty as a corporator. Not only has such a society an inherent right to expel members for non-payment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws, that such non-payment, within a stipulated time after notice, shall, without personal or other notice to the delinquent member, *ipso facto*, work a forfeiture of all the member's rights of membership.³ Where an officer or a member of an incorporated society, in account with the society, charges it with money which he has never paid out and disbursed, and seeks to obtain credit from the society for such fraudulent items, he is guilty of an offense against his duty as a corporator, and may be expelled.⁴ Though a person who is not a member of an incorporated mutual benefit society owes to it no corporate duty, yet a person who applies for membership and insurance therein is required to act in the utmost good faith. If he

¹ Franklin v. Commonwealth, 10 Barr (Pa.) 359. Lewin, 29 Hun (N. Y.) 87; Benevolent Society v. Baldwin, 86 Ill. 479;

² Society v. Meyer, 52 Pa. St. 125; Equitable v. McLennon, 6 Ins. L. J. Schweiger v. Society, 13 Phila. 113. 124.

³ Rood v. Benefit Association, 31 Fed. Rep. 62; McDonald v. Ross-
⁴ King v. Mayor, 2 Ld. Raym. 1566; King v. Chalke, 1 Ld. Raym. 226.

procure admission to membership on the false representation that he is in good health, and by suppression of the fact that he has an hereditary or incurable sickness, he commits an offense against his corporate duty by the acceptance of membership and of the contract of insurance so procured by fraud, and may be expelled.¹ When in his application for membership in such a body he knowingly misrepresents his age as less than it really is, he may be expelled.² Where the charter of an association stated that it was formed, among other things, "to inculcate just and equitable principles in trade," it was held that a member might be expelled for obtaining goods under false pretenses, though the offense was not committed within the local jurisdiction of the corporation, nor against a member of the association. The court said: "When a person became a member, and subscribed to the articles of the association, he agreed as a condition of his being associated with the company that he would, by his example and his practice, aid in this great object and leading purpose of the corporation. This could most effectually be accomplished by a practice of integrity, honesty and fairness in commercial dealings, both in reference to the acts of the association and its members, at its place of business and elsewhere, at all times and on all occasions when engaged in trade. * * He had no right to make a distinction between dealing with members and strangers."³ Where a medical society, both by its charter and by-laws, has jurisdiction to inquire into and pass judgment upon the conduct of its members, and, in a proper case, to expel a member, gross immorality in a professional transaction, having a tendency to bring the profession into dishonor before the community, if distinctly charged and proved, is sufficient to justify the exercise of its power. And where a member of such a society sold out his practice and good will to another physician, and agreed not to practice medicine in the community, but soon afterward began to practice in the community, in violation of his agreement, and the society expelled him therefor, the court refused to restore him to membership.⁴

¹ *Morel v. La Société*, 1 Lower Can. Abb. Pr. 271; *Dickenson v. Chamber of Commerce*, 29 Wis. 45. Jurist, 1.

² *Vivar v. Supreme Lodge*, 52 N. J. L. 455; 20 Atl. Rep. 36. ⁴ *Barrows v. Mass. Medical Soc.*, 12 Cush. 402.

³ *People v. N. Y. Com. Ass'n*, 18

A medical society, having power by charter to expel its members, passed a by-law providing that no homeopathic physician should be admitted as a member, and passed another by-law providing that any member might be expelled for any conduct unbecoming and unworthy an honorable physician and member of the society. Under this last by-law, a member was charged with practicing medicine according to homeopathy, and the court held the charge sufficient under the powers and objects of the society.¹ A member of a society, in resisting the unlawful authority of the society, commits no offense against his duty as a member.² Where the charter of a chamber of commerce conferred upon the association the power to expel members as it should see fit, the court held that the association had no power to expel a member because he refused to submit to the arbitrament of the association, according to the by-laws, a claim against a fellow member. The court said: "Is it necessary for the good government and management of the affairs of the corporation, that it should have power to compel him to do any such act? We can not see that it is. On the contrary, the assumption and exercise of the power in this case strikes us very unfavorably."³ A board of trade or chamber of commerce, the object of which, as expressed by its charter, is to inculcate just principles in trade, may expel a member for gross violation of a contract entered into by him, even though the contract be between the member and one who is not a member, and even though the contract may be void by the Statute of Frauds.⁴ The charter of the Board of Trade of Chicago provides that "said corporation shall have the right to admit or expel such persons as they may see fit, in the manner to be prescribed by the rules, regulations, or by-laws thereof." Under that power the corporation adopted a by-law providing that if a member fails to comply with

¹ Gregg v. Mass. Medical Society, 111 Mass. 185.

² Leech v. Harris, 2 Brewster (Pa.) 571.

³ State *ex rel.* v. Chamber of Commerce, 20 Wis. 63; see State v. Merchants Exchange, 2 Mo. App. 96; Sweeney v. Beneficial Society, 14 W. N. C. 466-486.

⁴ Dickenson v. Chamber of Commerce, 29 Wis. 45; Blumenthal v. Cincinnati Chamber of Commerce, 7 Cin. Law Bul. 327; People v. N. Y. Commercial Association, 18 Abb. Pr. 271.

a business contract made with another member, upon satisfactory evidence of such fact, he shall be expelled. The court held that, although the discretion granted by the charter to expel members is not purely arbitrary, and can be exercised only for some just and reasonable cause, yet, as this rule was germane to the purposes for which the corporation was created, a member might be expelled for non-compliance with such a contract.¹ A member having been expelled from the common council of the city of Liverpool applied to the King's Bench for a *mandamus* to restore him. The return of the mayor showed, as cause for expulsion, that the member had become a bankrupt. The court held that the cause was insufficient, as bankruptcy was no ground for disfranchising a member of a municipal common council.² A member had vilified a fellow member, in violation of a by-law, and had been expelled therefor. The society was created for the purpose of aiding its members when in need, and of relieving distressed Irishmen emigrating to the United States. The expelled member applied to the court to be reinstated to the privileges of membership. The court said: "My opinion will be founded on the great and single point on which the case turns. Is this by-law necessary for the good government and support of the affairs of the corporation? I can not think that it is. * * On mature reflection it appears to me that, without an express power in the charter, no man can be disfranchised unless he has been guilty of some offense which either affects the interests or good government of the corporation, or is indictable by the law of the land."³ In *Earl's Case*, Carthew, 173, it was held that a member of a corporation may not be disfranchised for any personal offense of one member to another. Two members of an incorporated club were sitting together in conversation in the bar-room of the club-house, when a third member came in and used insulting language which was understood by one of the two to be applied to himself. He thereupon struck the offender, and was afterward expelled for the offense.

¹ *People v. Chicago Board of Trade*,
45 Ill. 112.

³ *Commonwealth v. St. Patrick's
Benevolent Society*, 2 Binney (Pa.)

² *Rex v. The Mayor of Liverpool*, 2 Burr. 732.

The court held that the act of striking his fellow member was not such as would justify his expulsion from the club by the members thereof,—that mere offenses against decorum, personal offenses of one member against another, so long as they do not tend to the subversion of the government of the corporation and the management of its affairs, do not justify disfranchisement on the ground of being against the duty of the corporator.¹ The libel of one member by another is no ground of expulsion.² Where a society is incorporated under a general law providing for the incorporation of benefit societies, its object is obviously civil and benevolent, and not religious, and it may not be made, directly at least, the promoter of religious discipline. While it can refuse admittance to persons who do not believe in certain religious doctrines, by rejecting their applications, yet it may not compel a person who has once been admitted to membership, to continue in that faith, and to continue to observe the discipline of any church, on pain of expulsion from the society. Such religious faith and discipline are totally unconnected with the objects of benevolent societies. The law permits religious societies to establish rules, regulations or articles of faith for the government of their own bodies, and he who becomes a member of such a religious society agrees to these rules, regulations and articles of faith, and to the mode of discipline and trial provided by it. But where a society is organized and incorporated for beneficial and benevolent purposes, under the statute of the state, a member may not be deprived of his rights in the society by a by-law not necessary for, or connected with the purposes and objects of the society, and relating to religious discipline, even though he may have assented to it. In such a society, a by-law providing for the expulsion of any member who shall not twice during each year attend to his duty of private confession and reception of the Holy Communion, is *ultra vires* and void.³ In one case the court held that a society chartered merely for the promotion of medical science had no right to decide what fees its members should charge for their

¹ Evans v. Philadelphia Club, 50 Pa. St. 107. ² People v. Society, 24 How. Pr. (N. Y.) 216; People v. Society, 41

³ Allunt v. High Court, 62 Mich. Mich. 67.

110; 28 N.W. Rep. 802; Mulroy v. Supreme Lodge, 28 Mo. App. 463.

professional services, and to expel a member who had disregarded such a regulation. The court said: "Can it be said with any plausibility that the establishment of a tariff of prices for medical services was a legitimate object of the creation of the corporation, or that it was necessary, or in any degree contributed to the accomplishment of the purposes or objects for which the law authorized the corporation?"¹ A member of a society, the charter and by-laws of which contain no definition of offenses against the society, or provisions for imposing penalties, may not be expelled or suspended for non-payment of a fine imposed by the society.²

An incorporated voluntary society has a right to provide in its by-laws for the levying of reasonable fines for breaches of duty to the corporation, and the nonpayment of any fine which may be imposed under the by-laws may be made the ground of dismissal and expulsion.³ Where the laws of a society do not make such an offense a specific cause for expulsion, "being drunk while drawing benefits" from the society is not a sufficient ground for the expulsion of a member, where it is not claimed that he was feigning illness at the time he became intoxicated.⁴

§ 40. **Expulsion from religious corporations.**—From the principles and authorities above set forth, it is evident that a corporation, the object of which is merely to hold the title to property, can neither admit nor expel members. As voluntary societies frequently make use of corporations to hold their property, while they themselves perform acts entirely independent of such corporations, it is necessary that the distinction between those acts which are corporate, and those which are merely the acts of these societies, should be thoroughly understood and constantly kept in view. In most of the states, the laws provide for the incorporation of religious societies. There is, of course, great difference between the provisions of these laws, but they are, in the main, drawn upon the same general plan. Persons desiring to form themselves into a religious society may sign articles of association for that

¹ *People v. Medical Society*, 24 Barb. (N. Y.) 571.

³ *State v. Association*, 43 La. Ann. 1098; 10 So. Rep. 169.

² *Erd v. Association*, 67 Mich. 233; ⁴ *Commonwealth v. Association*, 1 34 N.W. Rep. 555; *Otto v. Union*, 75 Mont. Co. L. Rep. (Pa.) 101. Cal. 313; 17 Pac. Rep. 217.

purpose, agree upon a name, elect trustees, and put their articles on record when duly perfected. They thereby become a corporation by the name agreed upon, and may take, hold and convey property, and exercise the ordinary functions of corporate bodies. The corporators are not necessarily professors of any particular belief or faith, or members of any church. Corporate succession is kept up by conferring the privileges of corporators on all who regularly attend worship in the society, and contribute to its support. The trustees who are to manage the temporal affairs of the corporation may, or may not, be church members. Connected with the corporation there is a church organization. This is spiritual in its objects. Its name may, or may not, be identical with the name of the corporation. This church has its voluntary members who are supposed to hold certain religious dogmas. It is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees. Membership in the corporation arises by operation of law from attendance at public worship, and contributing to the support of the corporation. The church can admit members into fellowship with it, according to its rules of admission, but it can not receive a person into the corporation, nor can it expel a person from the incorporated society. On the other hand, the corporation has nothing to do with the church, except as it looks after the temporalities, and provides for the wants of the church. It can not alter the church faith; it can not receive members; it can not expel members; it can not prevent the church from receiving or expelling whomsoever that body shall see fit to receive or expel.¹ A religious corporation has no spiritual capacity; it is given capacity in respect to temporalities only. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters. It has no power to try a corporator for moral delinquency, or to disfranchise him in consequence thereof.² Immoral men may not usually attend divine worship, contribute to the support of religious corpora-

¹Hardin v. Baptist Church, 51 53 N. Y. 103; Livingston v. Trinity Mich. 137; Calkins v. Cheney, 92 Church. 16 Vroom 230; Sale v. Baptist Church, 62 Iowa 26.

²People v. German, etc., Church,

tions, and insist upon their rights in such societies, but when they do, the law does not distinguish between them and those who have been regularly admitted into the church. The expulsion of members from unincorporated societies will be treated of further along in this chapter, but sufficient has already been said to show that a religious corporation, the sole object of which is to hold and administer property, may not expel its members.

Expulsion from membership in the church is effectual to exclude the member from the spiritual privileges enjoyed by its members, but it does not, in the least, affect his status as a member of the incorporated society. If, because of his expulsion from the church, any one should exclude him from the proper enjoyment of the property of the corporation for religious worship and instruction, he may maintain an action therefor, and, in fixing his damages, the injury to his feelings may be considered. The same course may be taken if prevented from exercising his right to vote when entitled to such right by the statute.¹ But the excluded member must, in such cases, sue the persons who illegally excluded him. An action in damages for expulsion from the church and deprivation of church privileges will not lie against the religious corporation connected with the church. While it is true that the church is an integral part of the corporation, it by no means follows that the corporation is chargeable with the wrongful acts of members of the church in expelling its members. Counties, towns, and school districts are integral parts of the state, but the state is not for that reason liable for their torts. The incorporated society may neither expel members from the church, nor prevent such expulsion, and it is neither liable in damages for a wrongful expulsion from the church, nor can it be proceeded against by *mandamus* to restore an expelled member to his spiritual privileges.²

§ 41. **Surrender by a society of its right to expel its members.**—While it is not competent for an incorporated society, by its constitution or by-laws, to surrender absolutely its inherent power of expulsion—its right to perform an act necessary to the preservation of its existence, it may, never-

¹ *People v. German Church*, 53 N. Mich. 137; *People v. German Church*, Y. 103.

² *Hardin v. Baptist Church*, 51

supra.

theless, by proper laws, qualify and abridge that right, by pointing out the manner in which, and the occasions on which, it will exercise such right. A limitation which does not deprive the incorporated society of the right to protect and preserve its franchise is unobjectionable. Where the constitution of such a society provides that "the manner of suspension for the non-payment of dues and assessments shall be detailed in the by-laws," and no by-law is adopted by the society on the subject of suspension, the neglect of the society to provide a mode and manner of suspension, prohibits it from exercising its inherent power to expel a member for failure to perform his corporate duty in the payment of dues and assessments.¹

§ 42. **Double sentence of society.**—A society may in proper cases provide in its by-laws for the imposition of a fine, suspension, or expulsion. It may provide for a double punishment, as for a fine and suspension. But it is well settled that in the absence of direct provisions, the power to give an alternative sentence does not authorize a double one, and that such a sentence is void.

§ 43. **Statute of limitations.**—In the absence of any provision on the subject in the constitution and by-laws of a society, there is no limitation as to the time within which an inquiry may be made by it into offenses against its laws. The statutes of limitation of a state do not govern such an inquiry, unless they are made a part of the laws of the society.²

§ 44. **Right to trial by jury does not apply to proceedings in expulsion.**—The constitutional provisions relative to the right of trial by jury do not apply to proceedings taken by an incorporated society for the expulsion of a member for offenses within its jurisdiction, but only to trials of issues of fact in civil and criminal proceedings in courts of justice. They have no application to incorporated societies which have the power of expulsion or disfranchisement, or to any bodies not exercising the ordinary jurisdiction of courts; or to collateral or incidental proceedings which are disciplinary in their character, by associations authorized by law, as to the conduct of their members who have voluntarily submitted themselves to their jurisdiction.³

¹ District Grand Lodge v. Cohn, 20 Ill. App. 335.

² People v. Association, 18 Abb. Pr. 271; *In re Newell Smith*, 10 Wend. 449.

³ Chase v. Cheney, 58 Ill. 509.

§ 45. **Regularity of proceedings in expulsion.**—A member of a mutual benefit society has a right to demand a substantial compliance with its rules governing proceedings in expulsion. When a rule prescribes that the vote on the expulsion of a member shall be given in writing, it is an irregularity vitiating the proceedings to take a vote by casting white and black balls.¹ Where articles providing for the appointment of a committee of investigation by the presiding officer do not direct how or when it shall be made, an appointment made immediately after the adjournment of the meeting which passed the resolution of reference, by the second vice-president who had presided at that meeting, and a subsequent appointment by the first vice-president to the places of two members first appointed who had refused to act, are not open to objection as to the source or time of the appointments.² A member was notified that on a certain night he would be tried by his lodge upon certain charges. He thereupon notified the principal officer of the lodge that, owing to certain duties which he was obliged to perform as county surveyor, he could not be present at the time and place fixed for the trial of the charges. He made no application for a continuance based on proof of the fact that he had public duties to perform at that time. He was tried at the time set, and expelled. The court held that the notice to the principal officer was not of itself sufficient to oust the lodge of jurisdiction to try him on the charges at the appointed time and place.³ A society has no right to expel a member merely because he does not appear, and without proving the charges against him. Even though the party charged does not appear, still, proof of his offense should be required.⁴ The return to a *mandamus* was quashed because the member had been expelled without proof of the offense with which he was charged, his presence and failure to deny the charge having been taken by the society as sufficient evidence of his guilt.⁵

Where an incorporated society in its by-laws adopts the rules in Cushing's Manual for the government of all debates of its members, and no other provision is made on that subject in

¹ Hoefner v. Grand Lodge, 41 Mo. App. 359.

⁴ People v. Society, 65 Barb. 357; Strempel v. Rubing, 4 N. Y. Supp.

² People v. Society, 28 Mich. 261. 534.

³ Robinson v. Yates City Lodge, 86 Ill. 598.

⁵ Rex v. Faversham, 8 T. R. 356.

the by-laws, Cushing's Manual must control the members of the society in that matter. That provides that if offensive words are not taken notice of at the time they are spoken, but the member is permitted to finish his speech, and then any other person speaks, or any other matter of business intervenes before notice is taken of the words which gave offense, the words are not to be written down or the member using them censured. Therefore, where a member in debate at a meeting of the society uses what are considered offensive and improper words which are not objected to or noticed at the time, or during the meeting, he may not be tried and expelled for using those words, upon charges made at a subsequent meeting, even though the use of such words was, under the charter and by-laws, a sufficient cause of expulsion. An expulsion under such circumstances is irregular and without authority.¹ When a member has been tried before an incorporated society in which a two-thirds vote of the members present was required to expel a member, and more than one-third of those present voted against the resolution to expel him, this amounted to an acquittal. A subsequent trial and expulsion, on the same charges, for the same offense, is irregular and void. A member who has been regularly tried and acquitted by a society may not be twice put in jeopardy before the society for the same offense.² But where a member has been irregularly and illegally expelled from a society, it may set aside and annul the void proceedings, restore the member, and proceed against him regularly for the same offense.³

When the laws of a society provide that a member may be expelled for refusing to comply with the decision and order of its tribunal in any matter submitted to the tribunal under the by-laws, it is error to expel a member for such refusal, when he has, under the by-laws, appealed from the decision of the tribunal to the society at large. When a member has submitted a controversy to such tribunal, and appealed from its decision, under provisions of the by-laws giving him the right of appeal, the society has no right to proceed against him for

¹ *People v. American Institute*, 44 47 Wis. 670. But see *Otto v. Union*, How. Pr. 468. 75 Cal. 313, 17 Pac. Rep. 217, where

² *Commonwealth v. Guardians of the Poor*, 6 Ser. & R. (Pa.) 469. the reinstatement of the member for the purpose of expelling him again

³ *State v. Chamber of Commerce*, was taken as evidence of bad faith.

a failure to comply with such decision, and the denial to him of his right of appeal from such decision is an irregularity and an error, from the effects of which a court of equity will afford him relief.¹

The requirements and provisions of the constitution and by-laws of a society are intended as safeguards for the members against improper suspension and expulsion, and their office is to secure to its members a fair and impartial trial. The neglect or refusal of the society to comply with them in any substantial particular in a proceeding in expulsion will be irregular as against a protesting member. A society was authorized under its by-laws to expel members for the non-observance of its constitution, by-laws or rules, provided that "no such expulsion * * shall be made, except on charges preferred, a copy of which shall be served upon the member so charged." Under such provisions, a notice summoning the relator to attend a meeting of the board of directors, at a time and place therein stated, to show cause why he should not be expelled from membership for a violation of a certain by-law, does not comply with the provision of the by-law, requiring charges to be made and a copy to be served, if the member refuses to answer the charge. He has a right, under such a contract of membership, to a trial on charges and specifications which he shall have full opportunity to answer.² The constitution of a society directed that charges against a member should be referred to a committee of five members; that this committee should reduce to writing its opinion as to the guilt or innocence of the accused, and present it to the lodge; that at the next meeting after the presentation of the report, a ballot should be taken, and if a majority of the votes cast were in favor of the report, it should be recorded as the judgment of the lodge. There was no provision as to the procedure when a majority of the ballots were cast against the report. It was charged against a member that he gave a false age upon entering the lodge. The committee, to whom the charges were referred, examined into them and reported in writing to the lodge that all the members of the committee believed that a false age had been given, but that three of its

¹ Powell v. Abbott, 9 W. N. C. 231.

² People v. Musical Union, 47 Hun 273.

members did not believe that the false statement had been made with any malicious intent, or intent to defraud. At the next meeting the motion that the charge be sustained, and that the accused be suspended for ninety-nine years was carried by a large majority. This proceeding was held to be irregular and void, because the report of the committee practically exonerated him from guilt, and the suspension was beyond the authority of the lodge under the constitution.¹

Where a society has jurisdiction to expel its members but no mode of procedure is specified, it may adopt such mode of trial as it pleases, subject only to the implied limitation that it be fair.²

§ 46. **Record of proceedings in expulsion.**—It is a maxim of the law that a corporation speaks by its records. It will be presumed that entries made in the minutes of meetings of a society have been made by the proper officer. The entry of an order of suspension on the minutes of the society is *prima facie* evidence of its legality, but parol evidence is admissible to show that it was merely the order of an officer, without the requisite vote of the members.³ The records and minutes of a private corporation are admissible to prove its acts, but they are not the only mode of proof. They are *prima facie* admissible, but may be rebutted by parol.⁴ While the records of a society may be contradicted, and it may be shown that they do not fully disclose all the proceedings which ought to have been recorded, yet it is clear that proof of that kind must be so convincing and satisfactory as to leave no doubt but that the matter attempted to be interpolated into the records of the proceedings of the society actually occurred. Where the records of each meeting are read at each succeeding meeting, and are subject to correction at such succeeding meeting, the presumption will be strong in favor of their truth and exactness.⁵ The expulsion of a member from an incorporated society should be shown by its minutes, proceedings or records, and not by the statements of its officers

¹ Vivar v. Supreme Lodge, K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36. ⁴ Partridge v. Badger, 25 Barb. 147; Whart. Ev. § 661; Abbott's Trial Evi-

² Spillman v. Supreme Council, 157 Mass. 128; 31 N. East. Rep. 776. ⁵ Hawkshaw v. Supreme Lodge, 29

³ Knights of Honor v. Wickser, 72 Fed. Rep. 770. Texas, 257; 12 S. W. Rep. 175.

or members; in other words, it should be shown by some official action or corporate act on the part of the society.¹ The records which every corporation is supposed and bound to keep, must show upon their face the exact cause of expulsion, and all of the proceedings necessary to authorize action upon its part. These facts should be determined by the record itself in case they are brought in question.² Where the laws of the society require that charges preferred against a member be read in open lodge, that a copy of them be furnished to him under the seal of the lodge, and that he be cited to appear to answer them, the record should show that these requirements were fulfilled; and a mere record of a sentence of expulsion, or suspension, without any record of the proceedings to found this sentence upon, is a nullity.³ The minutes and reports in writing are the best evidence of what took place in meetings of the tribunal which expelled a member, for upon them the resolution of expulsion is based. In an action by a member of a society, who has been expelled, to have the resolution of expulsion adjudged null and void, a member of that tribunal may not, as a witness, make any statement as to what particular conduct on the part of the expelled member was deemed by the tribunal improper and prejudicial. Such a statement would be his opinion merely. What is wanted in such an action are the facts, not the conclusions or judgment of the witness. It would clearly not be permitted to the witness to place his interpretation upon, or give his opinion of, the proceedings and actions of the tribunal which are evidenced by such minutes and reports. Nor may such a witness be asked to state what conduct on the part of the expelled member, he, as a member of the tribunal, deemed to be improper and prejudicial to the society. When the witness voted upon the resolution of expulsion, he performed a judicial act, and he may no more be asked the particular ground upon which he based his judgment than a judge, a juror or arbitrator could, after judgment, be questioned as to the reason or basis of his determination. Inquiry into what was said by members of the tribunal during the investigation about the charges and the

¹ High Court v. Zak, 136 Ill. 185.

³ Lazensky v. Supreme Lodge, 31

² Roehler v. Society, 22 Mich. 86; Fed. Rep. 592.

Medical Society v. Weatherly, 75
Ala. 248.

guilt of the accused member, would violate the sanctity of such proceedings, and weaken their efficiency. Such inquiry is clearly opposed to the policy out of which such investigations originate, and by which they are to be conducted. Such investigations are in their nature judicial. If the conduct and action of the members of the tribunal, in the discussion and decision of questions before it, are to be the subject of public discussion and comment, it would greatly embarrass them, and prove to be a restraint upon a free debate on the questions involved. What member of the society would be willing to serve on such a tribunal, if his remarks concerning the matters for discussion and decision could be made public? With the result of the discussion, as expressed by a proper and sufficient vote, the parties must be satisfied.¹ It is evident that the records of a society are as much the records of one member as of another, and that they are evidence against him.² They are evidence in disputes between members of the society, but not against strangers.³ They are competent to show who are its members.

¹ *Loubat v. Leroy*, 65 N. Y. 138. *Grand Lodge*, 131 Ill. 498; 22 N. East

² *Diehl v. Adams County Mutual*, Rep. 487, at § 252.

58 Pa. St. 443; *Washington Society* ³ *Commonwealth v. Woelper*, 3 Ser
v. Bacher, 20 Pa. St. 425; *Bagley v. & R.* (Pa.) 28.

CHAPTER IV.

MEMBERSHIP.—PART II.

- § 47. Reinstatement of member; remedies in society must be exhausted.
- 48. Jurisdiction of appellate tribunal when appeal is irregular.
- 48a. Subordinate society refusing to obey order of superior body.
- 49. When decision of appellate tribunal is final.
- 50. Death pending appeal to courts of the society.
- 51. Injunction to restrain illegal expulsion.
- 52. Action for benefits where expulsion of the member is inquired into.
- 53. Action for damages for unlawful expulsion.
- 54. Injunction to reinstate expelled member.
- 55. Reinstatement by courts of justice.
- 56. Mandamus the proper remedy.
- 57. Mandamus a discretionary writ.
- 58. Delay in applying for restoration.

§ 47. **Reinstatement of member to his rights; remedies provided for the expelled member in the laws of the society.**—Where a voluntary society provides, in its charter, constitution or by-laws, a mode for reviewing and correcting any error or injustice on the part of any subordinate tribunal by which a member has been tried and expelled, he is bound to avail himself of the remedy so provided, before he may ask a court of law or equity to investigate the regularity of the proceedings. These proceedings, being subject to review, may be annulled by the action of the tribunals created in the society and clothed with authority to investigate the proceedings of such subordinate tribunals; and those who fail to avail themselves of the opportunity thus offered to correct these irregularities within the society, will be repelled from the courts. Courts will not in any wise interfere with, or inquire into the affairs of such a society until they are obliged to act, and until the aggrieved member has exhausted all the remedies provided in its laws. It is not necessary that its laws shall provide in express terms that the member must appeal from the

decision expelling him to a higher tribunal in the society, before seeking restoration by a court of justice; the mere right to appeal from such decision, for the reasons just stated, creates a duty on the part of the expelled member to exhaust his right of appeal in the society.¹

A by-law providing that a member who has been expelled may be reinstated at any regular quarterly meeting of the society by a two-thirds vote of all the members present, after having paid all dues and fines standing against him, and an extra fine of fifty dollars, is not intended to provide a method of reviewing the proceedings instituted to remove the member, and he is not obliged to resort to it before instituting proceedings to procure a peremptory *mandamus* restoring him to his rights and privileges as a member.² Such a provision has reference to a lawful expulsion, and to cases where the society may exercise its discretion in the restoration of a member. After having submitted his rights to a tribunal of the society, or after having appealed from a lower to a higher tribunal in the order, a member may not, before the decision is announced, apply for relief to the courts of the land.³

It has been held that the rule requiring a member to exhaust his remedies in the society before resorting to the courts applies, in its strictness, only to those cases in which the right is given to appeal to an officer or to a tribunal other than the tribunal which convicted and expelled him. When the remedy provided in the society is not in the nature of an appeal to a higher officer or body, or to a superior tribunal, but is merely in the nature of a petition for a rehearing to the same persons who convicted and expelled the member, the court will examine into facts concerning the trial and expulsion, and determine whether, under all the circumstances, the aggrieved member should have applied to them for a reconsideration of the case upon its merits before resorting to the court. A resolution of expulsion was adopted by the governing committee

¹ Karcher v. Supreme Lodge K. ² People v. Musical Union, 47 Hun of H., 137 Mass. 368; Harrington v. 273; People v. Protective Union, 118 Workingmen's Ben. Association, 70 N. Y. 101; 23 N. East. Rep. 129; aff. Ga. 340; Poultney v. Bachman, 31 affirming 42 Hun 454.

Hun (N. Y.) 49; White v. Brownell, 2 ³Strempel v. Rubing, 4 N. Y. Supp. Daly 329; Lafond v. Deems, 81 N. Y. 534.
507; see §§ 111, 311.

of a society, by a vote of fourteen to four, upon the report of a committee of five of its members, who had been appointed to investigate and report as to the facts. The by-laws of the society provided that in cases of expulsion the expelled member might make an application to the governing committee for a rehearing. The expelled member, however, without making such an application as he was authorized to do by the by-laws, resorted to the court. It was claimed that, before bringing the action, the plaintiff should have applied to the committee to have the resolution of expulsion reconsidered and revoked, and that, in consequence of his failure to do so, the court would refuse to interfere in his behalf. But the court, in considering this question, said: "The resolution which they (the members of the governing committee) adopted conclusively establishes the fact that they had formed and acted upon convictions adverse to the plaintiff, and, after that, the probability is extremely slight, indeed, that they could have been induced to change their views and act differently upon an application for the reconsideration of the resolution. The probability that favorable action might in this manner have been secured by the plaintiff is so extremely remote that, in the reasonable administration of the law, he should not be held to be required to apply for such reconsideration before commencing an action to restrain the enforcement of the resolution against him if that should turn out to have been unlawfully adopted."¹ This distinction is not sustained by analogy to proceedings in courts of law, for a motion for a new trial is required to be made before the tribunal in which the trial took place, before an appeal may be prosecuted. It is but fair that the tribunal in which the trial took place should have an opportunity to correct its errors, and it is to be presumed that such tribunal will act in good faith upon the application. Because the members of a tribunal have formed, and acted upon, convictions adverse to a member, it must not be assumed that they will continue to hold those convictions after they have looked carefully into an application for a reconsideration of their acts in the premises. Every presumption is in favor of the fairness and honesty of a tribunal which has expelled a member from a society. The interests of the fellow-

¹ *Loubat v. Union Club*, 40 Hun 546.

members are, naturally, that the rights of each individual member shall be sedulously guarded, as the same measure they apply to others may in the end be administered to themselves. The obligation to appeal to the higher tribunals within the society is not imposed where the judgment is void for want of jurisdiction. Such a judgment of expulsion may be likened to a judgment rendered by a court which has no jurisdiction of the subject-matter or of the person. No appeal or writ of error is necessary to get rid of such a judgment; it is void in all courts, and in all places. Thus, a suspension of a lodge by an officer not vested by the laws of the order with that power, without notice and opportunity to the lodge for a hearing, is absolutely void, and can not affect the legal rights, or change the legal status of the lodge or any of its members, and from such an order of suspension no appeal, in the mode provided in the laws of the order, is necessary to save the rights of the lodge or its members.¹

Where the expulsion of a member by his lodge was without jurisdiction, as where it was founded on a charge on which the lodge had no jurisdiction to try him, his expulsion is null and void, and it is not incumbent on him to take steps to have it reversed in a higher judicatory of the society.² If when he has appealed to a superior tribunal, the member is practically deprived of the benefit of such remedy, by evasion, intentional¹ delays, or other unjust procedure on the part of such tribunal, he may resort to the courts, alleging and proving such evasion, delays, or other unjust procedure, as an excuse for not having exhausted his remedy in the society. But it must clearly appear in such a case that the appellate tribunal is acting in bad faith and in practical disregard of the member's right of appeal.³ There is no presumption that there is open to the expelled member a remedy under the constitution and laws of the association itself, for a review of the proceedings in his expulsion, and, in case of error, for his reinstatement. This must be made to appear.⁴

§ 48. Jurisdiction of appellate tribunal when appeal is

¹ Hall v. Supreme Lodge, 24 Fed. Rep. 450; Mulroy v. Supreme Lodge, 28 Mo. App. 463. ² Carlen v. Drury, 1 Ves. & Beames 154; White v. Brownell, 2 Daly 329.

⁴ Olery v. Brown, 51 How. Pr. 92.

³ Glardon v. Supreme Lodge, 50 Mo. App. 45.

irregularly taken.—When the laws of a society give to its superior tribunal the right to hear complaints and appeals and to redress grievances arising in subordinate lodges or councils, the validity of the action of that tribunal in reversing and setting aside a judgment of expulsion rendered in such lodge or council may not be disputed on the ground that the appeal was not taken and presented in the exact manner prescribed by its laws. While the superior tribunal may not be required to act on an appeal, taken without regard to the prescribed rules, it may certainly waive all such requirements. Prescriptions with regard to appeals are designed for the government of subordinate lodges or councils and their members, but they are not limitations upon the authority of the superior tribunal. Where the general authority to redress grievances is conferred upon some higher body or committee of the society, it undoubtedly has the power, even when no appeal has been taken, to summon before it the necessary members and subordinate officers, and give such redress as a grievance may imperatively demand.¹

§ 48a. **Subordinate society refusing to obey order of superior body.**—In an action by a benefit society against a member for money loaned, the defense was that the defendant had been wrongfully deprived of membership in the lodge and money privileges thereto appertaining, exceeding plaintiff's claim, and that, upon defendant's appeal from such expulsion to the grand lodge, according to the rules of the society, his reinstatement was ordered, which order the local lodge refused to obey. It was held that a court of equity would refuse to aid plaintiff until the order of reinstatement was obeyed, according to the rules of the society, although the grand lodge itself had no mandatory powers to enforce its superior authority; that the court would grant relief in equity by refusing to enforce payment of the claim of the society against such member, until the case was heard on its merits.²

§ 49. **Appeal to superior tribunal "whose decision shall be final."**—It is a question, upon which the authorities do not agree, whether a society may create judicial tribunals for the final and conclusive settlement of controversies arising under

¹ Vivar v. Supreme Lodge, 52 N. J. L. 455; 20 Atl. Rep. 36.

² Schmidt v. Lodge, 84 Ky. 490; 2 S. W. Rep. 156.

its contracts of membership or its contracts of insurance. Some cases hold that it may,¹ and others hold that it may not.² The constitution of an unincorporated society provides that "any member having a grievance, shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final." A member of the society, who had been expelled, applied to the central body for reinstatement to membership, but his application was denied. He then instituted a proceeding for reinstatement in the courts. It was urged that the court had no jurisdiction, and upon this question the court said: "No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere, but when, under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its actions may, however, to that extent, be the subject of review."³

§ 50. **Death of the member pending his appeal to the higher courts of the society.**—A member was expelled by his lodge. He appealed under its laws to the grand dictator, and pending the appeal he died. Subsequently the judgment of expulsion was reversed by the grand dictator. He was reinstated by a vote of the lodge, as required by the by-laws, and the assessments due at the time of his death were paid as provided in the by-laws. The court said: "If the analogies of the common law are to be regarded, the appeal did not abate by the death of (the member)."⁴ By the reversal of the sentence

¹ *Fritz v. Muck*, 62 How. Pr. 70; *Lodge v. Schmidt*, 98 Ind. 374; *Toram v. Association*, 4 Pa. St. 519; *Supreme Council v. Forsinger*, 125 Cincinnati Lodge v. Littlebury, 6 Ind. 52; 25 N. East. Rep. 129; *Austin v. Searing*, 16 N. Y. 112; *Strasser v. Wentworth*, 4 Cin. L. Bull. 513; *Staats*, 13 N. Y. Supp. 167; *Poultney v. Anacosta Tribe v. Murbach*, 13 Md. v. Bachman, 10 Abb. New Cases, 252; 91; *Osceola Tribe v. Schmidt*, 57 Md. Stephenson v. Ins. Co., 54 Me. 70; 98; *Rood v. Benefit Society*, 31 Fed. Home Ins. Co. v. Morse, 20 Wall. 445; Rep. 62; *Van Poucke v. Society*, 63 Barron v. Burnside, 121 U. S. 186; Mich. 378; 6 Western Rep. 122; 29 Scott v. Avery, 5 House of Lords N. W. Rep. 863; *Canfield v. Great Cases* 811; see §§ 316, 317. Camp, 87 Mich. 626.

² *Otto v. Union*, 75 Cal. 313; 17

Pac. Rep. 217.

³ *Dolan v. Court of Good Samaritan*, 128 Mass. 437; *Elkhart Mutual v. Houghton*, 98 Ind. 149; *Supreme*

⁴ *Green v. Watkins*, 6 Wheat. 260.

of expulsion, and by the action of the lodge, he was reinstated as at the date of his expulsion, and was entitled to his benefit. It may be added that such was, at the time, the law of the order, which had held, by its supreme dictator, that if a decision of expulsion was reversed on final appeal, the appellant stands a member as if there had been no such judgment, and he must pay all back dues and assessments; and if, pending the appeal, he die, had regularly tendered his dues and assessments, and after death the appeal is decided in his favor, his benefit will be paid as one who died in good standing, less the amount of his tendered and unpaid dues and assessments.”¹ A mutual benefit society was open to members of a certain order only. Its laws provided that if any member should be suspended from his subordinate lodge, his membership in the society should cease at the time of such suspension; but that if his suspension should be set aside by higher authority in the order, his standing in the society should be the same as if no action had been taken, and he must pay all assessments made during such suspension. A member was suspended from his subordinate lodge. He appealed to higher authority in the order, and after his death the suspension was reversed. It was held that the member was in good standing at his death, and that his beneficiary was entitled to recover the benefit fund from the society. The court said: “The second ground on which the validity of the action of this committee is denied is that (the member), being dead at the time, could not be restored to membership. But it was not required that he should be actually restored to membership. It was enough, in the words of the constitution, * if the ‘action of the subordinate lodge was reversed by higher authority.’ His death in no way prevented such a reversal. The rights to be impaired by that action survived him, and the persons in whom those rights vested were as really aggrieved thereby as he would have been had he lived. Their grievance, arising in the (lodge), the grand lodge had power to redress. It is an every-day occurrence to reverse judgments erroneously rendered against those who have since died, and although such a

¹ Marck v. Supreme Lodge K. of H., 733; Connelly v. Association, 58 Conn. 29 Fed. Rep. 896; see Jackson v. As- 552; 20 Atl. Rep. 671. sociation, 78 Wis. 463; 47 N. W. Rep.

reversal can not restore the status of the decedent in fact, it may do so in legal contemplation."¹

§ 51. **Injunction to restrain illegal expulsion.**—Courts of chancery have jurisdiction in a great variety of cases to enjoin parties from proceeding in courts of law. Their jurisdiction extends as well to proceedings in the highest as in the lowest and most limited tribunals; and courts of one state may enjoin parties from proceeding in the courts of other states. But injunctions issue against parties, and not against courts; and the jurisdiction in this respect has legal limits which apply to proceedings in all courts and tribunals. The proceedings of a society in expelling members are judicial in their character, and, in such proceedings, the society performs the functions of a court of limited and special jurisdiction. A court of chancery has no more power over the proceedings of a court of special and limited jurisdiction than over proceedings of courts of general jurisdiction. Where the inferior tribunal has jurisdiction of the subject-matter, a bill in equity will not lie to correct and restrain alleged irregularities in the pleadings and procedure before it; nor will it lie to enjoin the tribunal from a judicial determination of the matter before it, in order that the court may inquire into the alleged improper constitution of the tribunal. The general principle is, that a court of chancery is not the proper tribunal to correct the errors and irregularities of inferior tribunals, and that in ordinary cases the court may not interfere.² A medical society, incorporated under a charter empowering it to expel its members, summoned the plaintiffs, who were members, to appear before a board of trial composed of members, to answer charges preferred by a committee, that the plaintiffs had violated the by-laws of the society by conduct unworthy of honorable physicians and members of the society, in practicing according to a certain exclusive theory or dogma, and that plaintiffs belonged to an association whose purpose was at variance with the principles of the society. Plaintiffs, thereupon, filed a bill in equity against the society, the board of trial, and the committee preferring charges, alleging that it

¹ *Vivar v. Supreme Lodge*, 52 N. J. cases there cited; *Mooers v. Smedley*, 6 Johns. Ch. 28; *Heywood v.*

² *Kerr on Injunctions*, C. 3, and *Buffalo*, 4 Kern. 534.

was the defendants' intention to expel the plaintiffs only and solely for practicing homeopathy; that the body to try them was wrongfully constituted; and that the proceedings were irregular and void. The supreme court of Massachusetts held that the court had no jurisdiction to interfere by injunction with the proceedings before a court of limited and special jurisdiction.¹ It was held in one case, by the judge of the court of common pleas for Philadelphia, that an injunction will lie to restrain a contemplated illegal expulsion. In stating the grounds of this decision, the court said: "Equity prevents mischief. It does not wait until it is consummated. It does not even measure the paces by which it advances. It meets it at the threshold, and seeks to prevent a meditated wrong more often than to redress an injury already done. Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which special injunctions shall be granted or withheld."² The right of a court of equity to interfere in this class of cases, at least where the society is unincorporated, has been maintained by other courts.³

Where a member of a society has been cited to appear before one of its officers and show cause why his rights of membership should not be forfeited for failure to pay assessments, injunction to restrain the forfeiture will not lie before the member has appeared before such officer and asserted his defense.⁴

§ 52. Action for benefits where the expulsion of the member is inquired into.—Where a person, formerly a member of a mutual benefit society, sues the society for benefits, and the question of his proper expulsion is inquired into and determined under any of the issues presented in the case, both the plaintiff and the society are concluded by such determination, unless the decision is appealed from. An expelled member commenced an action against the society for the recovery of

¹ Gregg v. Society, 111 Mass. 185; Rep. 217; Huston v. Rentlinger, 91 see Sturges v. Board of Trade, 86 Ill. Ky. 208; 15 S. W. Rep. 897. 441.

² Leech v. Harris, 2 Brewster (Pa.), Y. Supp. 63; 68 Hun 565; citing 571; citing Story's Equity Jurisprudence, § 862. Thomas v. Union, 121 N. Y. 50; 24 N. East. Rep. 24.

³ Otto v. Union, 75 Cal. 313; 17 Pac.

weekly allowances. His claim embraced a period before his alleged expulsion, and extending beyond it. Among the defenses interposed to his right to recovery was that of his expulsion prior to the bringing of the suit upon his claim. A judgment was rendered in this action for weekly allowances up to the date of his expulsion, but his claim for benefits after that period was rejected. Upon the trial the record of plaintiff's expulsion was given in evidence, and other evidence was also given touching the regularity of the expulsion under the rules of the society. The plaintiff might, perhaps, have avoided a decision upon the question of his expulsion, had he limited his claim to the time of the alleged expulsion, and could then have properly invoked the aid of the court to annul the record of his expulsion, if he had sufficient cause therefor; but by including in his claim for weekly allowances a period beyond his expulsion, and by submitting the question of its regularity to the decision of the court upon the trial of the claim, he became bound by its decision, and his only remaining remedy was by appeal from the judgment.

Upon application, made after the rendition of this judgment, for restoration to membership, the court dismissed the plaintiff's complaint upon the sole ground that the question of his expulsion had been determined against him on the trial of his claim.¹

When a matter is regularly determined, in whatever form, by a competent tribunal, it is not open to inquiry in any other proceeding between the same parties. A judgment at law is conclusive in equity upon the same subject between the same parties. And where the legality of the expulsion of a member is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject is forever closed.

§ 53. **Action against the society for damages for unlawful expulsion.**—As a general principle it may be laid down that a member of a corporation may lawfully sue the corporate body for an injury which he has sustained from the miscon-

¹ *Bachman v. Arbeiter Bund*, 64 *Woolsey v. Odd Fellows*, 61 *Iowa How. Pr.* 442; see §§ 310, 319; see 492; 16 *N. W. Rep.* 576.

duct of its officers or agents,¹ and that where a power to act in certain matters has been delegated to a select body, such as a committee or board of directors, and has been exercised by it, the corporation is to be considered as having done all that the select body did in the proceeding. But it is exceedingly doubtful whether a member of a mutual benefit society, who has been illegally expelled, may waive his right to a *mandamus* for restoration to membership, and sue the society for damages for the unlawful expulsion. Such a member undoubtedly has property interests, to which he is entitled to protection from the courts, but if he has not been lawfully expelled, he is entitled to be restored to his rights. It is manifest that the most exact and complete remedy is by restoration, for in this way he is not only vindicated in his character, but is also re-established in the very rights which belong to him. An action for damages, however, assumes the illegal expulsion, waives the wrong, and demands compensation for the injury. If he waives the wrong, acquiesces in the expulsion, and forfeits his right to restoration, it does not follow that he is entitled to compensation. One may not always waive a tort for the purpose of maintaining an action which, without the tort, would have no foundation. In an action for assault and battery, if one waive the tort, there is nothing to sue for. Members of the society alone have rights in its property, and if a member waives the illegality of the act of expulsion, and acquiesces in it as a legal and accomplished fact, he must take it with its consequences; and the consequences of an expulsion, with the element of illegality dropped out of it, are a valid deprivation of membership, for which no action lies.² Ordinarily a mutual benefit society has no fund, which may be applied to the payment of a judgment for damages, and it would seem that one who had voluntarily given up his right to restoration to the rights and privileges of membership should not be permitted to recover such a judgment against it. It is a serious question whether any measure of damages can be laid down in an action for compensation for an unlawful expulsion. Members of a mutual benefit society have no severable interest in the fund

¹ Gray v. Bank, 3 Mass. 385.

Cal. 240; 27 Pac. Rep. 191; Cooley,

² Lavalle v. Société, 17 R. I. 680; 24 Torts, 2d Ed., 107-111; see Blumen-
Atl. Rep. 467; Peyre v. Society, 90 feldt v. Korschuck, 43 Ill. App. 434.

or property. It can not be determined whether they will continue to pay dues or assessments and thus continue their membership. The payments to be made by them may far exceed the value of the property or funds of the society, and there may be a loss to them if they continue in membership. Matters of speculation and guessing are too uncertain to form a basis for the measure of damages. It must be stated, however, that the few decisions on the question as to the right of one who has been illegally expelled to maintain an action for damages are not in accord. It has been squarely held that such an action may be maintained, though nominal damages only were given in that case.¹

In some cases there are *dicta* that such an action may be maintained, but there is no discussion of the grounds on which the right of action rests. It is assumed that compensation should be given for an injury caused by a violation of a right.² In a suit for damages for wrongful expulsion, it is not sufficient for plaintiff to aver that the proceedings in expulsion were irregular and void, or that the charges against him were not such as he might lawfully be expelled for under the contract of membership, or that he had no notice of the meeting at which he was expelled, or of the charges against him. He may not sue for loss of membership if the adjudication is void. In such a case his remedy would clearly be to enforce by *mandamus* his restoration, a right he still has. His remedy would not be to obtain damages for its loss.³ An action may not be maintained against a society by a person to recover damages on account of his suspension for misconduct, when the proceeding was had under the provisions of its by-laws and was affirmed on appeal taken by himself under the by-laws, and it is immaterial whether the facts upon which the determination was predicated justified the suspension or not.⁴ Where an organization, such as a chamber of commerce, acting on a void adjudication of expulsion, deprives a member of his rights as such, it commits a trespass upon him, and is liable

¹ Ludowski v. Society, 29 Mo. App. 337.

² Lavalle v. Société, 17 R. I. 680; 24 Atl. Rep. 467; Blumenthal v.

³ Society v. Bacher, 20 Pa. St. 425; Chamber of Commerce, 7 Cin. L. People v. German Church, 53 N. Y. Bull. 327.

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⁴ Peyre v. Society, 90 Cal. 240.

in damages for the trespass. It is not necessary for him to show that he was assaulted and put out of a meeting or session, or that in attempting to enter, he was violently laid hold on and kept out. It is sufficient to show that he was physically kept out; that he could not have gone in without bringing about a breach of the peace or an assault. He need not put the matter to a test.¹

The bringing of an action by a person who has been illegally expelled from an incorporated society, to recover damages for deprivation of his rights and privileges, is a waiver of his right to a *mandamus* to restore him to membership. A member of an incorporated society was expelled, without any notice to him or knowledge on his part. After such expulsion he brought an action to recover damages for the loss of his rights and privileges as a member occasioned by such expulsion, and in the action he recovered a verdict and judgment for \$275. While this cause was pending in error in an appellate court, the member sought by *mandamus* to be restored to membership in the society. In considering the effect of the action for damages upon the application for the writ of *mandamus*, the court said: "The gravamen of this action is, that by the expulsion he has lost all the rights and privileges of membership. That being true, the satisfaction of his judgment is compensation for all he has lost, and nothing remains for which he can complain further. But without such judgment, if he brings his action for these causes, that action is based upon the theory that he has lost membership and all his rights, and that he can not be restored thereto; otherwise he has no cause of action. If his rights are not gone, and gone irrevocably, his petition is not true when it says he has been deprived of those rights. In bringing such action, therefore, in order to maintain it he necessarily abandons all interest in the society."²

§ 54. **Injunction to reinstate expelled member.**—There are several cases in the books, in which expelled members have exhibited bills in equity against their societies complaining of their illegal expulsion, and praying an injunction to

¹ *Blumenthal v. Chamber of Commerce*, 7 Cin. L. Bull. 327. But see *St. 665*.
² *State v. Slavonska Lipa*, 28 Oh. Innes v. Wylie, 1 Car. & Kir. 262.

restrain the society from interfering in any manner with the full enjoyment of their rights, privileges and franchises of membership. It is evident, however, that in these cases the members have mistaken their remedy. Injunction is a preventive remedy. It comes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it can not be applied correctively so as to remove it.¹ Nor will such a bill for an injunction be aided by an allegation that a petition for *mandamus* has been filed in a court of law, praying that the society show cause why a writ of *mandamus* should not be issued, requiring it to restore the complainant to all his rights, privileges and functions of membership. Resort may not be had to the writ of injunction, either directly or indirectly, to obtain affirmative relief. Where a party is excluded from membership in an incorporated society, the rightfulness of his expulsion must be tried at law, and, until his rights are thus settled, a court of equity will not interfere, by injunction, to restore him to his position, even though he may suffer a loss of profits which he might make through his membership before the action at law can be determined. An injunction should not be awarded in doubtful cases. Its use is the exercise of a delicate power, which should not be encouraged by courts, except in clear and well defined cases falling within principles of equity jurisprudence, sanctioned by well adjudicated precedents. The injury which an expelled member of a board of trade or chamber of commerce may suffer in the loss of profits which he might make by reason of the privileges of membership, can not be regarded as sufficient to justify a court of equity to interfere by injunction and place the expelled member in the full enjoyment of the rights and privileges of membership, without stopping to inquire whether the expulsion was legal or illegal.² The plaintiff, who had been expelled from the Board of Trade of the city of Chicago by its board of directors, brought suit in equity to obtain an injunction to restrain said board from interfering with his access into the hall of the association, and with his carrying on his business

¹ Wangelin v. Goe, 50 Ill. 463; Me- v. Board of Trade, 80 Ill. 85; Baxter
nard v. Hood, 68 Ill. 122. v. Board of Trade, 83 Ill. 146.

² Wangelin v. Goe, *supra*; Fisher

therein. He alleged that two of the directors were not naturalized citizens of the United States; that two of them were prejudiced and unfair; that some did not hear the evidence, but read it after it had been written out; that the prosecuting witness was improperly sworn before a notary public, and that plaintiff was not guilty of the charges brought against him. The court held that such a proceeding was not proper, as it was an attempt to attack collaterally the judgment of expulsion.¹

§ 55. **Reinstatement to membership in an incorporated society by courts of justice.**—Where the charter of a society provides for an offense, directs the mode of proceeding and authorizes the society on conviction of a member to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and can not be inquired into collaterally by *mandamus* or any other proceeding. The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses, but they do not inquire into the merits of what has passed *in rem adjudicatam* in a regular course of proceeding. The society in such a case acts judicially, and its sentence is conclusive like that of any other judicial tribunal. This is nothing more than the application to the decrees of these societies, affecting their members, of the familiar principles which obtain in relation to the validity and effect of judicial determinations of controversies between citizens in the courts. If the court has jurisdiction of the subject-matter and the parties, its judgment, however erroneous on the law and the facts, concludes the parties unless appealed from. When an expelled member resorts to a court of justice to compel the society to reinstate him, he does not appeal from the judgment of the society; courts of justice have no appellate jurisdiction in such cases. All that he can ask the court to decide is, whether or not the charge against him was sufficient under the powers of the society, and whether the necessary steps for his expulsion were regularly taken after notice and opportunity to be heard. The supervision which courts maintain over the right of expulsion in corporate societies is derived from what is termed the visitatorial power of courts. In this country, the visitatorial power of correcting the abuses and irregularities of incorpo-

¹ Pitcher v. Board of Trade, 121 Ill. 412; 13 N. East. Rep. 187.

rated societies is vested in the courts of general jurisdiction. The assent of the members to the provisions of the charter and by-laws is a fundamental requisite of membership, and where the right of expulsion for certain causes is conferred upon the incorporated society, it may be exercised in the manner and for the purposes prescribed in its laws. But while courts will not inquire into the merits of the decisions of incorporated societies in expelling a member in the regular course of proceedings, yet, if the expulsion has been irregularly conducted, without due authority, sufficient cause or proper notice, the courts will interfere by *mandamus* to compel the restoration of the member to his corporate franchise.¹ It has, in one or two cases, been doubted whether membership in an incorporated society which is purely literary, social, scientific, benevolent or religious, and owns no property, is such a right as the court will protect, and whether the right of meeting the other members, and enjoying their companionship, is such a vested right as courts will take cognizance of.² But it is clearly settled, both upon principle and authority, that the franchise which is vested in each member of a corporation is a vested right and privilege which the courts will not permit such societies to abuse or destroy. In this country the franchise is granted by the state, and it will be presumed in the courts of the state that its grant is of value to its citizens. Thus, in one case it was held that the place of trustee in an eleemosynary corporation, though no emoluments are attached to it, is yet a franchise of such a nature that a person improperly dispossessed of it is entitled to restoration, and a peremptory *mandamus* was awarded.³ Such a franchise is an incorporeal hereditament. All immunities and franchises are

¹ People v. Mechanics' Aid Society, 52 Pa. St. 125; Smiths v. Society v. Vandyke, 2 Whart. (Pa.) 308.

² People v. German Society, 15 Pa. St. 251; People v. Medical Society, 24 Barb. 570; Commonwealth v. Guardians of Poor, 6 Ser. & R. 469; Society, 8 Am. L. Reg. 533.

³ Fuller v. Trustees, 6 Conn. 532; see State v. Society, 38 Ga. 608; Manning v. San Antonio Club, 63 Texas, 166.

Binney 448; Society v. Common-

deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury to, or obstruction of them.

A member has a right to insist that proceedings for his expulsion were not conducted in substantial compliance with the rules of the society governing such proceedings. Voting on the question of his expulsion by casting white and black balls, when the rules prescribe that votes shall be given in writing is an irregularity which will invalidate the proceedings.¹ In the absence of any fixed rules of procedure in the constitution and by-laws of a society, the question is not whether the proceedings for the hearing and expulsion of a member might not have been conducted differently, and more in conformity with those which obtain in courts, under statutes and fixed rules, but whether or not the principles of natural justice have been violated in withholding from him a fair and impartial hearing, before the passage of the resolution for his expulsion. So long as he has had notice, and an opportunity to be fully heard, he can have no reasonable ground of complaint on account of this or that omitted step or form, on the part of the tribunal thus acting quasi-judicially.² Courts will take cognizance of the right of a tribunal to proceed with the trial of a member, but not of matters which relate to the mode of procedure.³ They will, therefore, take no cognizance of a refusal of the tribunal to issue a commission to take testimony, of its refusal to grant a new trial or of the alleged misconduct of a member of the tribunal. These are matters which relate to the mode of proceeding, and not to the right to proceed. And for the same reason, they will not consider the fact that the witnesses were not sworn when examined by the tribunal, where the contract does not expressly provide that they shall be sworn.⁴ A member of a society was charged with being guilty of fraud and improper practices. He appeared before the governing committee which tried him, made statements and explanations, cross-examined the witnesses who were produced, and read his defense at great length. At a subsequent

¹ *Hoeffner v. Grand Lodge*, 41 Mo. 486; *Chase v. Cheney*, 58 Ill. 509. App. 359. *Connolly v. Association*, 58 Conn.

² *Hutchinson v. Lawrence*, 67 552; 20 Atl. Rep. 671. How. Pr. 38.

⁴ *Walker v. Wainwright*, *supra*,

³ *Walker v. Wainwright*, 16 Barb. *State v. Verein*, 3 Cin. Law Bull. 295.

meeting, in his absence, two accusing witnesses were examined by the committee. The accused member afterward demanded that these witnesses be recalled to be cross-examined by him, but the committee refused to recall them, and expelled him. The court held that the action of the committee at the subsequent meeting was not just or fair to the accused in either a legal or equitable sense, and that it was an irregularity of procedure of which he had a right to complain.¹ A benevolent order contained three grades of membership, to the highest of which, the supreme council, petitioner belonged. The laws of the order provided for the expulsion of a member, and gave the method of procedure in expelling members of the two subordinate councils only. The supreme council was vested with original jurisdiction in cases of its own members, and had appellate jurisdiction as to matters emanating from the two lower councils. Petitioner was expelled by the supreme council, and petitioned for a *mandamus* to compel his reinstatement, on the ground that the procedure followed in expelling him did not conform to the method provided by the laws of the society. It was held that the mode of procedure provided in the case of the expulsion of members of the two lower councils did not apply to proceedings by the supreme council to expel one of its members, and that that body might adopt any method of trial which it might choose, subject to the implied limitation that it must be fair.²

The judgment of a proper tribunal of a society against a member on charges which by its constitution and by-laws it was authorized to investigate and act upon will not be examined into by a court on the weight or the competency of the evidence introduced to sustain the charges.³ The exclusion of a competent witness offered by the accused, on the ground that he is incompetent, is a mistake of judgment, and not an irregularity of procedure. If, on appeal to the higher tribu-

¹ *Hutchinson v. Lawrence*, 67 How. 144 Mass. 434; 11 N. East. Rep. 691; Pr. 47. *Society v. Commonwealth*, 52 Pa. St. 125; *Gray v. Society*, 137 Mass. 329.

² *Spillman v. Supreme Council*, 157 Mass. 128; 31 N. East. Rep. 776; citing *Grosvenor v. Society*, 118 Mass. 78; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Burbank v. Association*, Atl. Rep. 671. ³ *Blumenthal v. Chamber of Commerce*, 7 Cin. Law Bull. 327; *Connelly v. Association*, 58 Conn. 552; 20

nals of the lodge, the expelled member omits to complain of this mistake, he waives any right to have the error inquired into in a court or equity.¹ But it is certainly true, as urged in the dissenting opinion of Justices Green and Trunkey, in the case just cited, that where it is evident from the whole facts surrounding the case that the exclusion of the witness took place, not as a mistake of judgment, but as a part of a plan to exclude the member from benefits to which he was justly entitled, and in bad faith toward the accused, then the court should reinstate the expelled member. While every presumption is in favor of the fairness of proceedings in expulsion, still where a member's judges, jurors, accusers and debtors, are one and the same—namely, the society to which he belongs, mistakes of judgment upon the trial must not be so gross and inexcusable as to lead to the conclusion that they were intentional. If they are, the member should be reinstated. When a member charged with violating its rules appears before the tribunals of a society and submits his case without objecting to the mode of its proceeding, all irregularities of procedure are waived.² Where, under the constitution and by-laws of an unincorporated mutual benefit society, charges are preferred against a member who is apparently and actually of unsound mind, his failure to appear and answer is not excused by his insanity, and the society may regularly proceed, according to its laws, to convict him of neglect to appear, and punish him by expulsion and the loss of all rights in the society. In considering this question the court said: "It is claimed that Pfeiffer, being apparently and actually of unsound mind, could not be duly summoned or convicted of neglect to appear, and punished by expulsion and the loss of all rights in the society. There is no force in this point. A person who has even been adjudged a lunatic, and of whom a committee, both of person and estate, has been appointed, may be sued at law, and the judgment recovered against him is not void. It would be a contempt of the court which appointed the committee to sue without leave, but the judgment is valid. There was no reason why the lodge should not proceed against a person not adjudged a lu-

¹ Sperry's Appeal, 116 Pa. St. 391; ² Pitcher v. Board of Trade, 121 Ill. 9 Atl. Rep. 478. 412; 13 N. East. Rep. 187.

natic. He could have been defended and his rights protected. If they were not, the lodge might regularly proceed according to its laws. His alleged insanity did not excuse his failure to appear.”¹ The expulsion of a member of a mutual benefit society, when the tribunal had no jurisdiction for want of proper service of a notice and a copy of the charges against him, and while he is insane and incapable of giving jurisdiction by consent, is void, and is no bar to a suit by the beneficiary of a certificate of insurance, issued by it.² Where an insane member appears before a tribunal of a society trying him, and admits the truth of the matters charged against him, both his appearance and his admissions are void. One who voluntarily appears to an action must be able to intelligently comprehend the meaning of his act, and an admission can not bind one, unless he has the mental capacity to understand its force and effect. Appearance and admission involve the element of consent; and consent involves an act of reason. When one is bereft of reason, he can give no consent to proceedings against him.³

§ 56. **Proper remedy for reinstatement of expelled member.**—In case of the illegal disfranchisement of a member of an incorporated society, *mandamus* is the proper remedy for his restoration. This is the settled modern rule.⁴ The discharge of a corporate duty is treated as an office or function, and the corporation as a functionary. A corporate society having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of its members and the public, is not a private individual, in the ordinary sense of the word, so that an action which would be a sufficient remedy between individuals to enforce private rights, would

¹ Pfeiffer v. Weishaupt, 13 Daly. 161.

² Hoeffner v. Grand Lodge, 41 Mo. App. 359; Supreme Lodge v. Zulke, 129 Ill. 298; 21 N. East. Rep. 789; Where by statute an insane person who is under guardianship must be sued by service on his guardian, and must defend by guardian, a judgment recovered against him in any other manner is void.

³ Supreme Lodge v. Zuhlke, 129 Ill. 298; 21 N. East. Rep. 789.

⁴ Medical Society v. Weatherly, 75 Ala. 248; People v. Benevolent Society, 3 Hun, 361; State v. Georgia Medical Society, 38 Ga. 608; People v. Medical Society, 24 Barb. 570; Angell & Ames on Corp., Secs. 704, 705, 698; State v. Chamber of Commerce, 20 Wis. 63; People v. Supreme Council, 10 N. Y. Supp. 248; Lysaght v. Association, 55 Mo. App. 538.

be a sufficient remedy against it. In one case it was said: "An action to enforce the right could not be maintained against the corporation, because performance of a corporate function is not a duty to be demanded by action; and unless recourse could be had to the functionary in the first instance, the relator might have a cause for redress without a remedy." A member of an incorporated society, whose rights are withheld or violated by the society, and who is without other remedy, is entitled to the writ of *mandamus*. When a member has been expelled from a society, and seeks to be restored to membership, it is necessary for him to show, both in pleading and in evidence, that he was at some time a member of the society. If he shows that the society at some time recognized him as a member, this is sufficient to cast upon the society the burden of showing that it legally expelled him. In proceedings for reinstatement of a member, it is a question of fact, whether any, and, if any, what proceedings in expulsion took place in the society, but whether the expulsion was in accordance with the constitution and by-laws of the society is a question of law for the court to determine.¹ Where a society is proceeded against by a name not inappropriate as a corporate designation, and the application is resisted by it in that name, and no denial of its corporate character is contained in the papers, it will be presumed that it is in fact a corporation, and that the use of the writ of *mandamus* is proper.²

§ 57. **Mandamus a discretionary writ.**—The issuing of a peremptory writ of *mandamus* is discretionary with the court. By this it is not meant that the court may arbitrarily deny the writ to a person seeking restoration to membership in an incorporated society, but it is meant that a court, in the exercise of a sound discretion, may deny the writ to a person technically entitled to it, where it is apparent from the evidence in the case that the person is not entitled in good conscience to the protection of the court, or that reinstatement to membership would be useless to such person. Where a member was twice notified to appear before a tribunal of the society to answer charges, and he appeared twice, and broke up the

¹ *Osceola Tribe v. Rost*, 15 Md. 296; ² *People v. Benevolent Society*, 3 Hutchinson v. Lawrence, 67 How. Hun 361.

meetings, the court refused to reinstate him, where it appeared that he had been expelled at a third meeting without notice to him.¹ The court will not order a peremptory writ to issue, restoring a relator to membership in an incorporated society, where it is plain from the testimony that the members thereof may at once expel him in the manner pointed out and agreed upon in the laws of the society.² The power of expulsion, under the rules of a society, existed only in case of a member wrongfully reporting himself sick. A member was expelled on charges of disorderly conduct, abuse of family, and calling the chairman of the committee on sickness a liar. The committee to whom the charges were referred examined witnesses to show that the relator was drunk, instead of sick, while he was drawing benefits, and their report treated this conduct as coming within the charge. The statements of the witnesses were annexed to the charges, giving point to, and explaining them, and the relator had notice and opportunity to be heard. The minutes of the meeting recited that he was accused of having wrongfully drawn benefits. Upon the trial witnesses were heard in presence of the accused, and he had opportunity to cross-examine them. Upon these facts, the court said: "Irregularity not sufficient to deprive the relator of the full advantage of his opportunity to defend would scarcely warrant a court, in the exercise of its discretion, to interfere by a peremptory writ, since if the objection be simply to the irregularity of the expulsion, a restoration to membership would leave the relator liable to be expelled by a subsequent proceeding."³ The writ will issue only to do substantial justice, vindicate substantial right and prevent substantial wrong, and where the relator admits that he committed a wrong for which he might be lawfully expelled, the court will not order him to be restored, because he was not properly notified of the charges against him.⁴

§ 58. **Delay in applying for restoration to membership.**

—A member who has been illegally expelled from a society should apply for reinstatement at once, if at all. Seeming

¹ State v. Portuguese Society, 15 La. Ann. 73.

³ State *ex rel.* Dindorf v. Allgemeiner Deutscher Baecker Gewerbe Verein, 3 Cin. Law Bull. 295.

² State *ex rel.* Becker v. Society, 5 Cin. Law Bull. 124; State v. Society, 42 Mo. App. 485.

⁴ State v. Society, *supra*.

acquiescence in his expulsion is of itself unfavorable to his claim for restoration; for it is reasonable to suppose that he will at once move in the direction of recovering his lost rights and privileges, if he entertains a sense of injustice and wrong when he is expelled. Where a member for nineteen years after he was dropped from the roll of members paid no dues, took no interest in the affairs of the society, and attended none of its meetings, the court refused to inquire into the legality of his expulsion, and dismissed his application for restoration to membership. Even arbitrary and illegal expulsion may be accepted by a member, and where he neglects to prosecute his right to restoration to membership for an unreasonable length of time, the court may properly refuse to interfere in his behalf. The writ of *mandamus* is discretionary, and may properly be denied because of such unreasonable lapse of time.¹ In one case² the fact that the member had waited for six years to apply for restoration was commented upon unfavorably, though the case was decided upon another point. In one case³ the delay in making application for restoration, and the non-payment of dues to the society, were accounted for by the absence of the member in the army during the war of the rebellion. In another case⁴ the writ of *mandamus* was denied, and, in giving the reasons for such denial, the court said: "Another consideration in the case was that the expulsion complained of occurred in 1876, and the minutes showed that when he was expelled the relator left the society, saying it was 'all right;' and it would seem, from the fact of his delaying so long (about two years) to make application for this writ, that he continued for a considerable space of time to think it was all right." A notice to one who has been suspended from membership that he may be reinstated upon certain conditions, must be acted upon within a reasonable time, and it is a question for the jury to determine under all the circumstances of the case whether the application for reinstatement was made without unnecessary delay. Even in the case of a void expulsion or suspension, the expelled or suspended

¹ Bostwick v. Fire Department, 49 Mich. 513; 14 N. W. Rep. 501; see Mich. 458.
² § 294.

³ Pulford v. Fire Department, 31

⁴ State v. Verein, 3 Cin. Law Bull.
⁵ Bachman v. Arbeiter Bund, 64 295.
How. Pr. 442.

member is under a duty to the other members of a mutual benefit society to affirm or disaffirm the act of expulsion or suspension within a reasonable time and in some distinct and appropriate manner under the circumstances. Where he takes no steps of any kind to secure his reinstatement, permits dues which had accrued and were payable prior to the date of his expulsion to remain unpaid, makes no tender of such dues or of any subsequently accruing, and pays no subsequent assessments although notified of them, he must be taken to have acquiesced in and consented to the sentence of expulsion or suspension.¹

¹ *Gladson v. Supreme Lodge*, 50 Mo. App. 45; see § 294.

CHAPTER IV.

MEMBERSHIP.—PART III.

- § 59. Return to writ of mandamus.
- 60. Charges preferred against a member.
- 61. Notice of charges, notice of meeting.
- 62. When notice need not be given.
- 63. Sufficiency of notice.
- 64. Service and proof of notice.
- 65. Waiver of notice.
- 66. Answering charges immediately when presented.
- 67. Tribunal of society expelling a member.
- 68. Good faith in proceedings in expulsion.
- 69. Decree of court reinstating member must be presented to the society.

§ 59. **Return to writ of mandamus.**—The return to a *mandamus* to reinstate a member of an incorporated society must distinctly set forth all the facts relating to the expulsion, in order that the court may judge of its sufficiency, both as to the cause, and the form of the proceedings. It must show the cause of the expulsion, notice to the person expelled, such as will give him an opportunity to be heard, and such as conforms to the provisions on the subject in the contract of membership, the assembly of a proper tribunal, the proceedings before them, a conviction of the offense, and an actual expulsion by the society.¹ These requirements are in harmony with the well settled principle, that in all cases of special and limited authority, especially when it is penal in character and to be exercised in derogation of the common law, great strictness and jealousy is to be exercised, not only in construing the law, but in canvassing the proceedings. Proceedings to disfranchise a member must be strictly construed, for a removal being an act of an odious nature, all clauses concerning it must receive a strict interpretation.²

¹ Commonwealth v. Society, 15 Pa. St. 251. ² Rex v. Sutton, 10 Mod. 76.

Where the charter expressly requires that charges against a member shall be proved by two or more credible witnesses, the return must state specifically that the charges were either proved on oath by two such witnesses, or that they were confessed.¹ And where the charter expressly requires that a charge against a member shall be made by certain officers of the society, and be signed by them, the return must show that the charge was so made and signed.² The facts must be set forth distinctly and certainly, not argumentatively, inferentially, or evasively. A return is insufficient, which states that the relator was, according to the constitution and by-laws of the society, "tried and convicted of the charges," without showing that the society took proofs which were deemed to be sufficient evidence of the truth of the charges.³ A return is insufficient, which states merely that the expelled member was present when the charge was made, and did not deny it; it should appear that the charge was proved.⁴

§ 60. **Return to the writ—Charges preferred against a member of an incorporated society.**—Where the constitution of an incorporated voluntary society makes "slander against the society" by a member an offense for which he may be fined or expelled, it will be held that an offense something analogous to the common law offense of slander, as applicable to individuals, is intended; and, in a proceeding to enforce such a provision, unless the words charged to be slanderous are set forth, it can not be known whether there is any jurisdiction to make the inquiry.⁵ If the return to the *mandamus* states in general terms that the member was expelled for violation of duty, without specifying the charges on which he was convicted, it is bad.⁶ Under articles of association providing for expelling members "guilty of improper conduct calculated to bring the society into disrepute," charges were preferred against a member: *first*, of receiving of an applicant for admission his proposed initiation fee, and failing to pay it over to the society,

¹ Ang. & A. on Corp., Ch. 29 Sec. 8; King v. Mayor, etc., 5 Mod. 25; ² Society v. Commonwealth, *supra*.
³ King v. Faversham, 8 T. R. 356; ⁴ King v. Faversham, 8 T. R. 356; People v. Society, 65 Barb. (N. Y.)
 Will on Corp., pt. 2, Sec. 240, pt. 1, 357.
⁵ Sec. 702. ⁶ Roehler v. Society, 22 Mich. 86.

² Society v. Commonwealth, 52 Pa. St. 125. ⁶ Commonwealth v. Guardians of the Poor, 6 Ser. & R. (Pa.) 469.

or to return it to the applicant, who had complained thereof to various persons; and, *second*, of having been intrusted by the secretary with the keys of the society chest to obtain a receipt book therefrom, and of having, at the same time, and without leave, taken from such chest the original roll of the society, and refusing to return it. It was held that the above provision covered cases of misconduct injurious to the society, and damaging to the reputation of the person charged, and that the charges were sufficient.¹ Where the articles of incorporation authorize the expulsion of a member for being concerned in scandalous or improper proceedings, which may injure the reputation of the society, it is a good cause of expulsion, that a member, claiming relief from the society, had altered a physician's bill from four dollars to forty, and had presented that bill to the society as evidence of his claim.² In a certain case the charges were, *first*, indecorous and improper expressions respecting the board of trustees, in charging the members of the board with being governed in their official acts by a spirit of sycophancy; *secondly*, neglect of official duty, in not performing his duty as one of a committee of the board of trustees in relation to one of its concerns. The court held that though the charges, if true, subjected the accused to the censure of all honorable men, they were insufficient as causes of expulsion from the society, under its inherent power of expulsion.³ The charge that a member of an incorporated society had "assisted as president of the society in defrauding the society out of the sum of fifty cents," without stating in what manner he had assisted in defrauding the society, under what circumstances of time and place, and without even stating that he had designedly assisted in the alleged fraud, is too vague and general to be sufficient. And the charge that he had been guilty of "defaming and injuring the same in public taverns," is equally vague and indefinite.⁴

In *State v. Georgia Medical Society*,⁵ the offense charged consisted in the fact that the relator became one of the sureties on the official bond of a colored citizen of his county, who

¹ *Burton v. Society*, 28 Mich. 261.

⁴ *Commonwealth v. Society*, 15 Pa.

² *Commonwealth v. Society*, 5 Bin- St. 251; *Mulroy v. Supreme Lodge*,
ney 486. 28 Mo. App. 463.

³ *Fuller v. Trustees*, 6 Conn. 532.

⁵ 38 Ga. 608.

had been elected clerk of the superior court of the county, by a majority of the legal votes cast at the election for that office, and in the further fact that he became surety on the bonds of certain other colored citizens who were charged with the offense of riot, for their appearance at court to answer the charge as the law directs. The charge was "ungentlemanly conduct," contrary to the by-laws passed under authority of the charter. The court held the offense, as charged, insufficient, and said: "He was expelled for doing that which the law of this state not only authorizes, but encourages. The very fact that the law requires the clerk of the superior court to give bond and security for the faithful discharge of his duties, is sufficient to justify any citizen of the county in becoming one of his sureties, and protect him, in contemplation of law, from the imputation of having forfeited his position as a gentleman by so doing." Where the rules of an incorporated society forbid a member to commence a suit at law against another member "except the case be of such a nature as to require and justify a process at law," it is not sufficient, in a return to a *mandamus*, to merely state the rule, and aver that the expelled member had commenced a suit at law. It should also be averred that the case was not of such a nature as to require and justify a process at law.¹ The charter declared the objects of an association to be, among other things, "to adjust controversies between its members, and to establish just and equitable principles in the cotton trade," and gave it power to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York, or of the United States, and "to admit new members, and expel any member in such manner as may be provided by the by-laws." The by-laws provided for expulsion for improper conduct, but did not state what should be considered as such. There was no express or implied authority conferred upon the association by its charter or by-laws to try the title to a seat in the exchange, and to determine who was the owner of a right of membership in dispute. A member asserted his ownership of a right to a seat which had formerly belonged to an expelled member, and the association claimed that the right of membership had been forfeited, and was subject to sale by it. A

¹ *Green v. Society*, 1 Ser. & R. (Pa.) 254.

committee charged with the investigation of this controversy decided adversely to the member's claim of ownership. He then commenced an action against the association, and obtained an injunction restraining it from selling the right of membership. For this act he was arraigned and expelled. The court held that he was not guilty of improper conduct warranting his expulsion for resorting to the courts to prevent the association from disposing of such a right of membership; that he was not acting in antagonism to the corporate power of "adjusting controversies between its members" or of "establishing just and equitable principles in the cotton trade," but was asserting a right secured to him by the fundamental law of the land.¹ Where the rules of a board of brokers provided that if any member should refuse to comply with his stock contracts, he should be expelled, it was held not to be a sufficient charge that a member had refused to comply with a contract for the sale of oil lands.² It is not a proper cause for expulsion that prior to the admission of a person to membership in a society, he conducted himself in such a manner, and performed such acts, as would justify the expulsion of a member for breach of his corporate duty. Persons who are not members of a society are not bound to observe its laws, and can not be said to break its laws by any of their acts. Where a physician, before he became a member of a medical society, advertised his ability to effect cures in certain diseases, it was held that, as he was not amenable to the laws of the society at the time he procured these advertisements to be published, the society had no jurisdiction to try him for the offense.³ A member of a fire department failed to pay his dues to the corporation for a long period of time, and the society passed a by-law providing that any one who had been in arrears for dues for a certain length of time should be expelled. The member was at once expelled, but the court held the charge insufficient, and the by-law void, as being in the nature of an *ex post facto* law.⁴

¹ People v. N. Y. Cotton Exchange, Y. 188; *In re Newell Smith*, 10 Wend. 8 Hun 216. 447.

² Leech v. Harris, 2 Brewster (Pa.) 571. ⁴ Pulford v. Fire Department, 31 Mich. 458.

³ People v. Medical Society, 32 N.

A return showed that the offense charged against the member was a breach of corporate duty in "illegally drawing aid as granted in case of sickness," and the minutes annexed to the return and made a part of it established the fact that the only finding against the member was "that the relator on June 16 was training his dog to fetch stones out of the water; that in the afternoon of that day he went to the Rising Sun, and appeared in the evening with the Schiller singing society, *in corpore*, at a wedding." In deciding that the return was insufficient, the court said: "Give to this finding a liberal construction; does it sustain the charge, or show a sufficient cause for disfranchisement? * * We think not. The relator may have been a very sick man, and yet occupied and enjoyed himself as above specified. If he has feigned sickness, or deceitfully drawn relief, then he has committed a wrong against the fundamental objects of the corporation, an offense against his duty as a corporator. The fact, however, must be stated as found after a formal investigation, and must not rest on an inference alone. The charge here is a grave one, but the finding is so indefinite as to render it impossible to say that the finding sustains the charge."¹

§ 61. **Return to the writ—Notice of charges—Opportunity to be heard—Notice of meeting.**—It may be stated, as the general rule, that a society, the members of which become entitled to privileges or rights of property therein, may not exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. It is a fundamental principle of law, recognized in every court of justice, that no man shall be condemned or prejudiced in his rights, without an opportunity to be heard. A society, or select number of its members, to whom authority is given in the premises, is a court when passing on the rights of its members. *Audi alteram partem* is the first principle in the administration of justice, and it is against natural justice to proceed against one's rights without giving him an opportunity to be heard in defense of them.² It is competent for the mem-

¹ *Schweiger v. Society*, 13 Phila. Muck, 62 How. Pr. (N. Y.) 69; *Loubat v. LeRoy*, 40 Hun (N. Y.) 542; *Supreme Lodge v. Zuhlke*, 1:9 Ill. 298;

² *People v. Benevolent Society*, 3 Hun 361; *Delacy v. Neuse River Nav.* 21N. East. Rep. 789; *O'Hara v. Stack, Co.*, 1 Hawks (11 N. C.) 274; *Fritz v.* 50 Pa. St. 477; *Wilis v. Child*, 13

bers of a society organized for the purpose of mutual insurance, to agree that the non-payment of an assessment levied by it, within a stipulated period of time after notice of the assessment, shall *ipso facto* operate as an expulsion of a delinquent member from the society. Such an expulsion is in reality a forfeiture of rights for a cause over which the member has full control, and for a cause which imputes to the member no disgraceful conduct.¹ But it is a well established rule of law that no man shall be condemned to suffer the consequences resulting from alleged misconduct, until he has been notified of the accusation, and been given an opportunity to make his defense. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal, or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. A by-law providing that a member may be expelled for any alleged misconduct, without notice to him, and without affording him an opportunity to be heard, is in conflict with the law of the land, and is void.² In *Manning v. San Antonio club*,³ it was held that, in the absence of a by-law of an incorporated club, requiring the member to be notified of the charges against him and the meeting at which he was to be tried, the action of the directors in expelling a member without notice to him, would not be annulled by the court. Upon this subject the court said: "It is true, that in most, perhaps all, of the cases which occur in the books, notice to the party is treated as necessary to the validity of the proceedings. But it is also true that most, or all, of these cases involve rights of such a character as are recognized and protected by the law of the land, or else the articles of association provide for notice to the party and some method of trial." In basing the decision in this case upon this opinion, the court seems to have forgotten that the first point decided in the case was that membership in an incorporated society is a valuable right which the court will protect, regardless of the question of property.

The by-laws of a mutual benefit society provided that each ap-

Beav. 117; *Hutchinson v. Lawrence*, 190; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69; *Wachtel v. Society*, 84 N. Y. 28; compare *dictum* in *People v. Society*, 24 How. Pr. on p. 221.

¹ See § 285 *et seq.*

² *Supreme Lodge v. Zuhlke*, *supra*;

Wood v. Woad et al., L. R., 9 Exch. ³ 63 Texas 166.

plicant for membership should be a member in good standing of a lodge of Odd Fellows, and that, if he were dropped or expelled from his lodge, his membership should cease, and the society should not be bound to his beneficiary. The by-laws of the Odd Fellows lodge to which a member of such mutual benefit society belonged, provided that notice should be issued by the secretary to members in arrears for dues, and that if the dues were not paid within four weeks from the date of notice, the delinquent should be dropped. It was held that it was not sufficient to cause the forfeiture of his rights in the mutual benefit society that the books of his lodge contained an entry that he had been dropped, in the absense of the evidence that he had received the required notice.¹ A return to a *mandamus* to restore an expelled member, which states that the expelled member was heard in his defense, is sufficient, without stating that he was summoned to appear.² Although the rules of the society do not provide that notice of the charges against a member, and of the meeting at which he will be tried, shall be given to him, he should have such notice and be given an opportunity to be heard in his own defense.

§ 62. Exceptions to the rule that notice must be given.

—Where a member of the society has been tried in a court of the land, found and adjudged guilty of an infamous crime, and the judgment of the court has been sustained in the highest court of appeals in the state, it is apprehended that an expulsion from the society, without notice, or perferment of specific charges, would be valid and binding. In such a case it is to be presumed that the member had a fair and impartial trial in court, and the judgment of the court being conclusive against the member as to his guilt, may well be accepted by the society as a sufficient determination of his unfitness for continued membership. A resolution at a proper meeting, declaring his rights of membership forfeited because of his conviction in court of the crime, would doubtless be a valid expulsion. Under a provision of the constitution of the grand or supreme body of a mutual benefit society, guaranteeing a fair hearing to every member before expulsion, except when such member has been expelled from a subordinate lodge of the society, of

¹ Odd Fellows Association v. Hook, 10 Cin. Law Bull. 391.

² King v. Mayor, 5 Modern Rep'ts 257; 2 Salkeld's Rep'ts 428.

which he was a member, it is competent for the grand or supreme body to expel, without notice, a member who has been expelled by the subordinate lodge.¹ Where a member was twice cited to appear and stand his trial before a tribunal of the society, and appeared each time, and, by ruffianism and violence, broke up the meeting and prevented a sentence, the court refused to exercise its equitable powers to restore him to membership, where it appeared that at a third meeting he was expelled without notice to him.²

§ 63. **Sufficiency of notice.—Waiver of sufficiency.**—In giving notice of charges against a member and of a meeting called to consider his expulsion, the rules of the society must be strictly followed. One of the by-laws of a society provided, among other things, that special meetings of the society might be convened as the president should deem necessary, or upon the requisition of any three members of the society, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting, in addition to that specified in the notice. The plaintiff, as one of the members of the society, having acted in such a manner as, in the opinion of the president, merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the president, and notices were accordingly sent to all the members of the society, stating that a meeting would be held “for special business,” but omitting to say what such special business was. At a meeting so called, at which the plaintiff was present, a resolution was unanimously adopted by the other members present, expelling him from the society. The notice calling such meeting being invalid, because it did not specify the business intended to be brought before the society, the court held that the resolution of expulsion had been illegally and improperly passed. The fact that the plaintiff had attended a meeting illegally called, and had entered upon a defense before the society, did not preclude him from afterward filing a bill

¹ Pfeiffer v. Mt. Horeb Encampment, 13 Daly 161.

² State v. Portuguese Society, 15 La. Ann. 73; see State v. Society, 42 Mo. App. 485, where the court refused to

reinstate the member for want of notice, when he admitted that he had committed an offense for which he might be expelled.

impeaching the proceedings as irregular and invalid.¹ Where a by-law required two weeks' notice of a meeting to be given, in was held that a notice posted at 3 o'clock A. M. on the 1st of the month for a meeting to be held on the 14th, was insufficient.² In discussing whether the fact that the accused member was present and addressed the society was a waiver of the sufficiency of the notice, the court, in this case, said: "In the next place, the general meeting was not properly called. On the other hand, it has been said that Mr. Labouchere attended that meeting, and entered into the discussion; that he did not protest against the meeting having been irregularly called; and that, therefore, he has no right now to complain; but on the other hand, Mr. Labouchere said he did protest, though it does not appear what the protest was. Mr. Labouchere was not compelled to say what it was. A man might say, 'I have a good defense upon the merits. I contend that I ought not to be expelled; therefore, I am not going to run away by availing myself of a technical objection.' He was entitled to say, 'Though the meeting was irregularly called, I have such a good case on the merits, that I should like to take your opinion.' But he was not bound to tell the meeting that it was irregularly or improperly called." The by-laws of a society provided that notice of a meeting for the expulsion of a member must be given. It was held that a notice of "a meeting to take into consideration the conduct of a member," was not a compliance with such provision; that it should have stated distinctly what was the object of the meeting.³ By the deed of settlement of a Baptist chapel, it was provided that the minister should be liable to be removed by the direction of the church, declared at one meeting, and confirmed at a second meeting; that all directions of the church should be declared by a majority of communicants present at a meeting of which notice should have been given in the chapel during divine service on Sunday morning at least four days previously; also that whenever the church should have to consider the appointment or dis-

¹ *Marsh v. Huron College*, 27 Grant's Chan. Rep'ts (Upper Canada) 605. ² *Cannon v. Toronto Corn Exchange*, 27 Grant's Chan. Rep'ts (Up-

³ *Labouchere v. Wharnccliffe, L. R.*, per Canada) 23.
13 Ch. Div. 346.

missal of a minister, the notice should expressly state the object of such meeting, and each of the directions to be declared at any such meeting should be reconsidered at a second meeting to be convened by public notice to be given in manner aforesaid, expressly stating the object thereof. On Sunday, the 18th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of bringing charges against and considering the dismissal of" the then minister. On the 24th of October the meeting was held and a resolution was passed that, in consequence of certain offenses alleged to have been committed by the minister, "he is not a fit and proper person to occupy the position of pastor; and that his office as pastor cease forthwith." On Sunday, the 25th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of confirming and ratifying" the resolutions passed at the meeting of the 24th; and on the 31st of October the meeting was held, and a resolution passed that the minutes of the meeting of the 24th be "passed, confirmed and ratified."

It was held that the notice of the 25th of October was invalid in law, because it did not specify the resolutions, of the intended confirmation of which it gave notice; and hence that the resolution of the 31st of October, and the dismissal of the minister, purported to have been thereby effected, were also invalid.¹ Where, by the laws of the society, it is necessary that notice shall be given to the society of the object of the proposed meeting, the proceedings of a meeting expelling a member, held pursuant to a notice which omitted to state the object of the meeting, are void under the positive provisions of its laws, because of such omission.² Where the by-laws of a society provide for special meetings of its board of directors on notice in writing to each director, and authorize the expulsion of a member at a special meeting, the board has no jurisdiction to expel a member at a special meeting of which one of the directors did not receive written notice, and at which he was not present. One director may be able to influence the minds of several others as to the propriety of the contemplated action of the board, and the accused member has a

¹ Dean v. Bennett, L. R., 9 Eq. 625. ² Weber v. Zimmerman, 22 Md. 156.

right to have the notice given to each one, so that he may have the benefit of the influence of any one of them in their deliberations.¹

Where notice of a special meeting of the board is required to be given to each director, and no provision is made as to the manner of service, the service must be personal, as required at common law.²

Independent of the positive provisions of the laws of a society, in order properly to exercise the right of expulsion of a corporator, notice must be given to all the members of the tribunal before which he is to be tried, that it is intended to consider the question of removing the particular person. Where the power of expulsion is in the society at large, notice must be given to all the members of the society; and when the power is in a select body, each member of such body must be notified.³ In giving notice of a meeting, it is not, generally, necessary to state what business is to be transacted, when it relates only to the ordinary affairs of the corporation; but when it is for the purpose of expelling a member, that fact should be stated; for members who might think that their attendance was unnecessary for the usual routine of business, will, perhaps, feel it their duty to attend a matter involving the rights of a fellow member. The notice should be given in the manner prescribed by the charter or by-laws, or, in the absence of any such provisions, by personal notice to the members of the tribunal. When it is intended to expel a member, it is, in general, absolutely necessary, not only that he should be summoned generally to attend, but that he should also be notified to answer the particular charges alleged against him; for it would be highly unjust, upon a general summons, to expel a member for a particular offense, when he has had no notice to prepare his answer to the charge.⁴ It is only necessary that the notice shall be sufficient to apprise the accused of the

¹ *People v. Association*, 18 N. Y. 2 Ld. Raym. 1355; *Wiggin v. Baptist Church*, 8 Met. (Mass.) 312; *Stow v.*

² *People v. Club*, 14 N. Y. Supp. 76. Wyse, 7 Conn. 214; 2 Bacon's Abridg.

³ For law to prevent surprise and fraud in election and expulsion, see 462-463.
⁴ *Simmons v. Society*, 10 N. Y. Supp. 293; *Wachtel v. Society*, 84 N. Y. 28; *Loubat v. Le Roy*, 40 Hun 2682; *Kynaston v. Mayor, etc.*, 2 Y. 28; *People v. Union*, 47 Hun 273.

nature and extent of the charge against him.¹ It is too late to question the sufficiency of the notice to appear and answer the charge, after the party has appeared in person, proceeded with the investigation, and made no pretense that he had not had time to prepare for trial.² If a person chooses to belong to a society which holds its regular meetings on Sunday, and, at such a meeting, he is served with a notice to attend the next meeting, it does not rest with him to make the objection that such notice is illegal because it was served on Sunday.³ Where the contract of membership provides that a copy of the charges against a member shall be served on him, he may refuse to answer the charges if a copy has not been so served.⁴

§ 64. **Service and proof of notice.**⁵—Where it is provided in the by-laws that no expulsion shall be made, except on charges preferred, a copy of which shall be served upon the member so charged, the serving of the charges upon the accused is a substantial jurisdictional provision, and the omission to make proper service will render his expulsion void unless it is obviated in some manner.⁶ A by-law of a religious society provided as follows: "Any member who shall either cease to regularly worship with the society, or who shall fail to contribute to the support of its public worship for the term of one year, shall have his or her name dropped from the list of members." It was held that a member could be deprived of his membership only by a vote of the society, after notice, and opportunity to be heard.⁷ In the absence of any agreement by the member, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights, or property; or, if that can be dispensed with, then in such other

¹ Gardner v. Freemantle, 19 W. R. 256.

⁵ § 257 *et seq.*

² Chase v. Cheney, 58 Ill. 509.

⁶ People v. Protective Union, 118 N. Y. 101; 23 N. East Rep. 129; affirming 42 Hun 656; see People v.

³ Corrigan v. Society, 65 Barb. 357.

⁷ Supreme Lodge v. Zuhlke, 129 Union, 47 Hun 273.

Ill. 298; 21 N. East. Rep. 789; People v. Musical Union, 47 Hun 273; Mass. 329; see Commonwealth v. People v. Protective Union, 118 N. Y. 101; 23 N. East. Rep. 129; affirming 42 Hun 656.

⁴ Gray v. Christian Society, 137 Pennsylvania Beneficial Institution, 2 Ser. & R. (Pa.) 141.

mode as will be most likely to effect its object.¹ Where a party is entitled to notice, and has not stipulated to have it transmitted by mail or otherwise, he is not bound by any notice until it has actually been received.² Unless some special mode or form of notice be required by the charter, or by-laws, personal notice will be sufficient.³ The constitution of a club gave power to the board of governors to censure, suspend, or expel members for misconduct, but provided that no such penalty should be enforced until after ten days' notice in writing had been given to the member. It was held that, in the absence of any agreement or provision to the contrary, personal notice was required; and a notice sent by mail, which, in due course, would have been delivered at the member's address ten days previous to the proposed action, but which was not received by him personally until nine days previous thereto, was insufficient.⁴ Notice of charges against a member is not sufficiently proved by the testimony of a witness, that he served on the accused member a written notice to appear at a particular time, where he also testifies that he can not say what the notice was, as he handed it to the accused without reading it to him, and it was written by an officer of the society, who is not examined.⁵ Where a firm is a member of a chamber of commerce, and each member of the firm has the rights of members of the chamber, notice of the charges of unmercantile conduct against any member of the firm, may be properly given to the firm itself.⁶

§ 65. **Waiver of notice.**—In one case,⁷ it is said that if the accused member is present when the subject of his expulsion is taken up, and is willing to enter into the inquiry immediately, there is no occasion for further notice. Wilcox on Municipal Corporations at page 265 lays it down as the rule, that when the accused has appeared at the meeting, and either de-

¹ *Wachtel v. Society*, 84 N. Y. 28.

² *Durhans v. Corey*, 17 Mich. 282; *Castner v. Farmers' Mutual*, 50 Mich. 273.

³ *Jones v. Sisson*, 6 Gray 288; *York Co. Mut. v. Knight*, 48 Me. 75; *Williams v. German Mutual*, 68 Ill. 387.

⁴ *People v. Hoboken Turtle Club*, 14 N. Y. S. 76.

⁵ *Downing v. St. Columba's Society*, 10 Daly 262. Proof of service or giving of notice involves proof of its contents. *Supreme Lodge v. Johnson*, 78 Ind. 110.

⁶ *Blumenthal v. Chamber of Commerce*, 7 Cin. Law Bull. 327.

⁷ *Commonwealth v. Beneficial Institution*, 2 Ser. & R. (Pa.) 141.

fends himself, or answers or confesses the charge against him, he thereby waives his right to notice. In *Downing v. St. Columba's Society*,¹ it is said: "It has been decided that though a member attends, and enters upon his defense, he does not waive his right to a notice of the charges." The reason suggested for such a rule is, that if a member be not apprised of the charges, he will have no opportunity to bring witnesses in his behalf. It is undoubtedly true that, if a member appears at a meeting where charges against him are taken up for hearing, and declares that he has had no notice of the charges, and that he is unwilling to proceed with the investigation, he does not waive his right to a notice of the charges by entering upon his defense. By his protest he saves his right to question the jurisdiction of the society over his person. But if he, without qualification, submits himself to the jurisdiction of the society, he undoubtedly waives his right to notice. The authorities cited by the court in *Downing v. St. Columba's Society*, *supra*, do not sustain the proposition therein laid down. They are to this effect: Where the contract of membership provides that, when charges are preferred against a member, notice of the meeting at which they shall be considered shall be given in a certain manner to the members of the society, the fact that the accused member attends a meeting of which proper notice has not been given, and enters upon his defense before the society, does not preclude him from afterward filing a bill impeaching the proceedings at that meeting as irregular and invalid for want of proper notice. As the society, in proceedings of expulsion, acts as a court of limited and special jurisdiction, it is necessary, in order that it may obtain jurisdiction of the subject-matter, that all the steps required, under the contract of membership, be taken. By an appearance at the investigation, the accused member neither confers jurisdiction of the subject-matter upon the society nor admits such jurisdiction to be in it. The society must, by its own acts, in accordance with the contract of membership, acquire jurisdiction of the subject-matter. But it may acquire jurisdiction of his person by serving the required notice upon him, or it may acquire it by the consent and act of the accused member, in submitting himself to its jurisdiction.

¹ 10 Daly (N. Y.) 262.

Where the by-laws provide that the accused shall be served with a copy of the charges made against him, he may waive such service by submitting himself to the jurisdiction of the tribunal. This a party may do before any tribunal having jurisdiction of the subject-matter involved. But where the accused, in answer to a summons to attend a meeting on a certain day to answer why he should not be expelled, appeared and denied the jurisdiction, because no copy of the charges had been served on him, and because the member making the charges did not appear personally against him, as required by the by-laws, it was held that he had not submitted himself to the jurisdiction of the tribunal for the purposes of the proceeding.¹ Where a member, against whom charges have been made, voluntarily attends the meeting at which the charges are heard, and defends himself on the merits, he thereby waives the requirement of the by-laws that he should be served with a certain notice and a copy of the charges, and he can not raise the point after an order of expulsion has been entered against him.²

§ 66. **Answering charges at same meeting at which they are presented.**—Sergeant Whitaker's case³ is sometimes quoted as authority for the statement that it is very doubtful whether a member waives his right to notice by appearing to, and answering charges at the same meeting at which the charges are presented. But Kyd on Corporations, on page 447, says of that case: "It is not easy to reconcile the event of the case with what is reported to have been said by the chief justice and the court, 'that the sergeant appearing, and being charged and answering, supplied the want of notice, both of the time and of the offense,' and 'that he might waive the notice if he would.' The ground on which the peremptory *mandamus* was awarded was that one offense was specified in the notice, and that he was charged with another when he appeared; how is this to be reconciled with the proposition 'that appearing and answering supplied the want of notice of the offense'?" That a man may waive anything which the law has intended

¹ People v. Protective Union, 118 N. Y. 101; 23 N. East. Rep. 129; Supp. 114; 4 Misc. Rep. 424.

affirming 42 Hun 656; People v. ³2 Ld. Raymond, 1240; 2 Salkeld's Musical Union, 47 Hun 273. Rep'ts 435.

for his benefit is a general proposition which can not be denied; and as previous notice of an offense charged against a party is given him only that he may come prepared to defend himself, he may, no doubt, dispense with it. But if he be present accidentally at a meeting, and answer immediately, or be unable to give an answer to a charge made against him, of which he had no previous notice, is it from thence to be concluded that he *waives* the necessity of such notice? I apprehend that nothing less would cure the want of notice than an express declaration of the party, that he consented to answer without it.”¹

§ 67. **Tribunal of the society expelling a member.**—The power of expulsion must belong to the society at large, unless, by the fundamental articles, or some by-law founded on these articles, it is transferred to select a number.² A return to a *mandamus*, which states that the member was tried and expelled by a select number of the society, is insufficient unless it further shows the authority of that select number.³ Where the organic law of a corporation provides that such societies “shall have the right to admit as members such persons as they may see fit, and expel any member as they may see fit,” the power of expulsion resides in the corporation at large, and may not be delegated to a select committee or board of directors.⁴ But where the charter confers the power to expel “such persons as the association may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof,” a rule prescribing the mode of expulsion by a trial before, and by a vote of the board of directors, is justified by the language of the charter.⁵ No corporation has the power to delegate to an outside body the power of expelling a member. Where various corporations send delegates to a grand council, whose powers in the premises are not derived from the incorporation laws of the state in which these corporations exist, it has no jurisdiction to expel members of these corpo-

¹ See *Rex v. Faversham*, 8 Term Rep’t 356; *Hoeffner v. Grand Lodge*, 41 Mo. App. 359; *Supreme Lodge v. Zuhlke*, 129 Ill. 298; 21 N. East. Rep. 789. *Hassler v. Association*, 14 Phila. 233.

³ *Green v. Society*, 1 Ser. & R. 254.

⁴ *State v. Chamber of Commerce*, 20 Wis. 63.

⁵ *Pitcher v. Board of Trade*, 121 Ill. 412; 13 N. East. Rep. 187; *State v. Chamber of Commerce*, 47 Wis. 670.

² *Commonwealth v. German Society*, 15 Pa. St. 254; *State ex rel. v. Chamber of Commerce*, 20 Wis. 63;

rations, or to review the proceedings in expulsion, which may have taken place in any of these corporations.¹ On the trial of a member of a lodge before a committee, an irregularity in the appointment of the committee under the by-laws is waived by the appearance of the accused, who, having knowledge of the irregularity, does not object to it.² Where a member of an association appears before a tribunal thereof, charged with violating its rules, and submits his case to it without objection to the manner in which the tribunal is constituted, all irregularities in the constitution of the tribunal are waived.³ The laws of a society provided that its governing committee, to which its government and management was confided, should consist of twenty-four members, and that a two-thirds vote of the governing committee should be necessary for the expulsion or suspension of a member. At the time when certain proceedings in expulsion were taken, the committee had been reduced in number to twenty members, and but eighteen were present when the vote for the expulsion took place. Fourteen of the members who were present voted in favor of the adoption of the resolution of expulsion, and the other four voted against it. The resolution, therefore, failed to secure the vote of two-thirds of the members of the governing committee; for to constitute such a vote, that of sixteen of the members was necessary. The judgment of expulsion in this case was irregular and illegal.⁴ Two members of a club had a quarrel, and one used abusive language toward the other. For this he was tried and expelled. One of the members of the tribunal which expelled him was a distant relative (cousin) of the wife of the person to whom the abusive language was addressed, and the expelled member brought suit to have the resolution of expulsion declared null and void. The court held, that although proceedings in expulsion must be characterized by honesty and good faith, yet such relationship does not disqualify the member of the tribunal from taking part in the proceeding, under the rules applicable in courts of law in case of the consanguinity or affinity of a judge to either of the

¹ *Allmut v. Forrester*, 62 Mich. 110; 9 Atl. Rep. 478; *People v. Society*, 28 28 N. W. Rep. 802; see also *Lamphere* Mich. 261.

v. Workmen, 47 Mich. 429; *State v.* ³ *Pitcher v. Board of Trade*, *supra*.
Miller, 66 Iowa 26; 23 N. W. Rep. 241. ⁴ *Loubat v. LeRoy*, 49 Hun 546.

² *Sperry's Appeal*, 116 Pa. St. 391;

parties, since the proceeding is not before a legal tribunal, nor *inter partes*, but is of a quasi-judicial character, by the club, in the way of discipline against the offending member.¹ The mere fact that members of the tribunal have become familiar with the subject-matter of the charges to be investigated, through conversations with members of the society and otherwise, does not disqualify them from serving, nor sustain a charge that they were biased or prejudiced against the party expelled.² The court of a society need not observe any of the rules of law as to challenge of jurors.³

§ 68. **Good faith in proceedings in expulsion.**—Malice, though not a crime, is a quasi crime, and will never be presumed by the courts. It must, when relied on as invalidating an expulsion be charged and proved specifically. The books speak of malice on the part of committees and societies in matters of expulsion; and in applications for reinstatement to membership and in suits for damages for wrongful expulsion, there are usually strong allegations of malice and bad faith in the proceedings of expulsion, and yet in the adjudicated cases there is little said upon the subject of malice and bad faith, except the decision of the court that, in the particular case in hand, there is, or is not, sufficient evidence of malice and bad faith to set aside the expulsion. It has never been decided whether malice may be shown by proving that each individual was independently actuated by malice, or whether it must be further shown that the members of the tribunal, whether composed of a committee or of the whole society, had combined together and agreed upon an illegal proceeding. Where malice and bad faith in the proceedings in expulsion are charged, the court will permit the members of the tribunal to testify as to the motives under which they acted in such proceedings, will permit them to give their reasons for voting in favor of the expulsion of the member, and to declare that they did not exercise their power capriciously, corruptly, unjustly or maliciously. They may also state that they acted *bona fide*, and were not influenced by the persons pressing the charges.⁴

¹ Loubat v. LeRoy, 15 Abb. N. Cas. 1.

² Loubat v. LeRoy, 15 Abb. N. Cas. 1.

³ Chase v. Cheney, 58 Ill. 509.

⁴ Lyttleton v. Blackburn, 33 L. T. Rep. (N. S.) 642; Gardner v. Freemantle, 19 W. R. 256; Hopkins v. Marquis of Exeter, L. R., 5 Eq. 63.

§ 69. **Decree of court reinstating member must be presented to society.**—One who has been expelled from membership in a society, but who has been subsequently reinstated by a decree of court, should present the decree in a regular manner, serve it on the officers of the society, and demand his reinstatement of such officers. He may not assert his status by simply appearing at the next regular meeting after the decree and insisting upon his rights, without informing the officers, in a regular manner, of the action of the court. If, while so appearing and insisting upon his rights, he is ejected from the hall in which the meeting is held, he can not recover damages at law.¹

¹ *McLafferty v. Sweeny* (Pa. St.), 9 Atl. Rep. 277.

CHAPTER IV.

MEMBERSHIP.—PART IV.

- § 70. Inherent power of unincorporated society to expel members.
- 71. Right of such society to pass by-laws providing for expelling its members.
- 72. Power of expulsion from usage.
- 73. Expulsion agreed upon in articles of association.
- 74. Charges against a member of such a society.
- 75. Reinstatement in unincorporated society.
- 76. Proper remedy of expelled member.

§ 70. **Inherent power of unincorporated society to expel members.**—In the absence of any provision in the constitution or by-laws of an unincorporated society, giving to the members the power of expulsion, there is no inherent power in the majority to expel a member. The society, as such, has no legal entity, and it would be manifestly absurd to say that it had the power of self-preservation. The written contract of association expresses the terms on which the members meet, and is the law governing the members in their relations toward each other. There is the greatest possible latitude given to members to agree upon the terms upon which they shall associate, but the law will supply no provisions in the articles of association. In the absence of an agreement that it may be done, the majority may not expel the minority of an unincorporated society.¹ It is sometimes said that this is the English rule, but that in this country the inherent power of such societies to expel their members is recognized, and may be exercised for the same causes as in incorporated societies. The case of *Leech v. Harris*² is cited as the authority for the so-called American doctrine. In the first place, the opinion expressed in that case, about which the court had “very

¹ District Grand Lodge v. Cohn, 20 Ill. App. 335; *Dawkins v. Antrobus*, L. R., 17 Chan. Div. 615.

² 2 Brewster (Pa.) 571.

little doubt," is a mere *dictum*, and then, the ground upon which the court predicated the opinion was that unincorporated societies were given a legal existence, and were placed under the supervision of the courts by the laws of Pennsylvania. And in *White v. Brownell*¹ it is said that "where they (unincorporated societies) have no regulation upon the subject they may expel a member by a vote of the majority, if he has been notified of the charge against him and afforded an opportunity of being heard in his defense."² The range of discussion is wide in the case of *White v. Brownell*, and the opinion is, in many respects, exceedingly valuable. The language quoted is, however, entirely outside of any questions in the record. The case of *Innes v. Wylie* is an English case which holds that a member may not be expelled from a society without notice, and that damages for deprivation of rights of membership can only be recovered in certain cases.

The court begins its opinion by saying: "I am of opinion that where there is not any property in which all the members of a society have a joint interest, the majority may by resolution remove any one member."³ The majority *can* remove a member in such a case, and he will be without remedy, because the courts will not exercise jurisdiction to reinstate a member where no rights of property are involved merely that he may enjoy the right to meet with other members, but the majority *may* not remove him, for it is fundamental, as will hereafter more fully appear, that the majority must proceed according to the rules of the society. Having no rules on the subject, how may they proceed in the matter?

In one case the charge upon which the member was expelled from an unincorporated society was that he had been guilty of a conspiracy to injure and destroy the society. The constitution provided as follows: "If any member defraud this union, he shall be dealt with as the central body may decide." Beyond this no specific provision appeared in the constitution or by-laws, under which members might be expelled. The contention of the society was that the power of expulsion is inherent in every society, and that the offense of which the member

¹ 4 Abb. Pr. N. S. 162; 2 Daly 329.

³ *Lyttleton v. Blackburn*, 45 L. J.

² Citing *Innes v. Wylie*, 1 Car. & Ch. 223; 33 L. T. R. 642; *Rigby v. Kir*. 262.

Conmol, 14 Chan. Div. 482.

was found guilty, was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws. The member was reinstated to membership upon the ground that the facts in the case raised the irresistible conclusion that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men in passing upon the rights of their fellow-men. But in the opinion the court subscribes to the proposition that there is an inherent right of expulsion in *every society*, and says: "The right of expulsion from associations of this character may be based and upheld upon two grounds: *First*, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation. *Second*, for such conduct as clearly violates the fundamental objects of the association, and, if persisted in and allowed, would thwart those objects, or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and, for the purposes of this case, need not refer to the numerous authorities defining and limiting the power."¹

It is evident from this language that the expulsion would have been sustained by the court, had it not found that malice and bad faith were the motives which prompted it. While this case is not an authority in favor of the proposition that unincorporated societies have an inherent power of expulsion, it indicates very decisively the opinion of the court upon the question. Where the contract of association is silent as to the expulsion of its members, and a minority, whether one or more, defrauds the members, or performs acts against the objects and purposes for which the members associated, the remedy is by dissolution and distribution of the property among the members. It is within the power of the members to provide the remedy of expulsion, and thus to preserve the association from dissolution in such cases, but the law will not interpolate into the contract of the associates a provision supplying such a remedy. The true rule is laid down in *White v. Brownell*,² where it is said: "As this association is not organized in pursuance of any

¹ *Otto v. Benevolent Union*, 75 Cal. 313; 17 Pac. Rep. 217. ² 3 Abb. Pr. N. S. 318.

statute, nor are the terms of membership fixed by principles of the common law, it follows that the agreement which the members make among themselves on the subject must establish and determine the rights of the parties on the subject. The constitution of the association and its laws agreed upon by the members contain all the stipulations of the parties and form the law which should govern. The members have established a law themselves."

§ 71. **Right of unincorporated societies to pass by-laws providing for expulsion of members—Effect of such by-laws on protesting minority.**—When a person becomes a member of an unincorporated society, he is bound by the laws of the society as they exist at the time of his admission. If, by the contract of association, the majority has power to make and alter rules affecting the general interests of the society, he is bound by such by-laws as may thereafter be passed concerning expulsion of members. But if the contract of association is silent as to future legislation by the members, he is not bound by subsequent by-laws, unless he voted for them, assented to them, or in some way acted upon them. There is no inherent right in an unincorporated society to pass by-laws for the expulsion of members.¹ In one case the question was as to whether a by-law, under which a member had been expelled, was binding upon him as a member of a certain club. The court said: "Now that does not depend on the inherent power of a club to pass a rule to expel one or more of its members; I, for one, am unaware of the existence of such a power, and I was surprised to hear such a proposition put forward. There is no more inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority, than there is in the members of any society or partnership which is founded on a contract, that written contract, of course, expressing the terms on which the members associate together; and it is intolerable to imagine that the majority should in such a case claim an inherent power of expelling the minority. I say this because that has been a matter pressed upon me as if capable of argument. I think it is not." Where the articles of association are silent upon the power of future legislation, a protesting

¹ Dawkins v. Antrobus, L. R., 17 Chan. Div. 615.

minority are not bound by the acts of a majority in passing by-laws.

§ 72. **Power of expulsion from long and immemorial usage.**—It is undoubtedly true that some unincorporated societies which have existed for many years, either as a certain and definite class, or as individual societies, have the right to inquire into the conduct of their members, and the power to expel them for certain offenses, whether this right and power is specially conferred by the contract of membership, or not. Churches, for instance, may expel their members for immoral and scandalous conduct. This power is established by long and immemorial usage; and when the usage has been proved, the law will presume the existence of provisions in every contract of membership in a church, giving to it this power of expulsion, and will also presume that the member joined the church well knowing, and assenting to, the recognized power of expulsion in the body of the church. It must be remembered that the contract of membership in a church is not a written contract; it arises from admission into fellowship with a large and indefinite body governed by certain customs and usages; it is, at most, a contract partly in writing and partly constituted of these customs and usages. It differs from a contract of membership wherein all the conditions of membership are specifically set forth. But even in a church, this power of expulsion is not to be regarded as an inherent power, but must be said to be a power arising from usage and custom which implies the existence of an unwritten by-law conferring the power upon the church. And an inherent power is vastly different from one which is conferred by a custom. It requires no evidence to establish the existence of an inherent power, but a custom must be proved as any other fact. It would be exceedingly difficult to prove a custom which would sustain the expulsion of a member from a society in which the contract of membership is specifically written out. Custom may not be shown to take the place of the contract of membership as agreed upon, but may be shown merely as evidence of the adoption of an additional unwritten provision. Where this contract, originally silent as to the power of expulsion, has been amended from time to time during the period over which it is proposed to show that the custom of expelling

members has extended, but no amendment has been added upon the subject of the power of expulsion, no custom can prevail over the express provisions of the contract as amended. And again, it may be questioned whether an established usage can be successfully asserted in any society which is only in its infancy,—which has only existed for five or ten years. A usage, in its most extensive meaning, includes both custom and prescription; but, in its narrower signification, it refers to a general habit, a mode or course of procedure. A usage differs from a custom, in that it is not required that it should be immemorial to establish it; but it must be known, certain, uniform, reasonable, and not contrary to law. It will, therefore, be next to impossible to show that, under a contract of association which has been only a few years in existence, there can have grown up a usage in regard to the expulsion of members, although no express power of expulsion is given by the terms of such contract. To make a proper showing of such usage, it is necessary to show cases sufficiently numerous to establish a course of procedure, in which the power has been exercised and acquiesced in by the society. To be able to cite a few instances in which such a power has been exercised will not establish a usage. This doctrine is, by analogy, clear and well settled.¹ There is no reason for the existence of a constitution and by-laws, if they are to be overridden by mere usages and customs open to dispute.²

§ 73. **Expulsion of members agreed upon in the contract of association.**—An unincorporated society may, in its articles of association, prescribe the conditions upon which the continuance of membership shall depend. There is one, and only one, qualification to this rule; such society may not make the continuance of membership dependent upon a condition which is contrary to the laws of the land. In such a society, the privilege of membership is not given by statute, as in a corporation, but is created and conferred by the organization itself, and is derived exclusively from the body which bestows it. When a person becomes a member he bases his rights, as such, not upon any charter which guarantees to him a certain protection under the laws of the land, but upon the

¹ *Knights of Pythias' Case*, 3 Brewster, 452.

² *Lazensky v. Supreme Lodge*, 3 N. Y. Supp. 52.

will of a majority of his fellow members, under the contract of association. The policy and acts of such a society are necessarily controlled by a majority of its members; and the constitution and by-laws agreed upon contain the contract of association, and form the laws which govern the majority, and each member of the society. It is not the province of a court to make contracts for parties, and it may not make any other contract for the members than that which is set forth in the constitution and by-laws. The court has no visitorial power over unincorporated societies, since they exist, not by grant from the state, but by the agreement of the members; and when the parties have agreed upon the terms under which membership shall continue, the court will not inquire into the reasonableness or unreasonableness of such terms. There are *obiter dicta* in some cases, and one decision to the effect that courts will not inquire into the reasonableness of by-laws of voluntary societies, even though they be incorporated, if it be shown that the member assented to them.

There are numerous *obiter dicta* in the books to the effect that courts will not interfere with the rules and by-laws of unincorporated voluntary societies, *unless they are manifestly harsh and unconscionable*; but it is believed that there is not a case in which a court has ever declared a by-law of such a society to be unreasonable and, on that account, invalid. The true rule is that the by-laws of an incorporated society must be reasonable and necessary for its good government, as well as in conformity with the laws of the land, and the assent of the members to the by-laws is not to be considered as determining their validity; but individuals who form themselves into an unincorporated voluntary society for a common object, may and do agree, that, so long as they retain their relations with the society, they shall be governed by the constitution and by-laws as they exist, and as they may be amended under the contract of association, if there is nothing in them or in such amendments, in conflict with the law of the land; and those who become members of the society are presumed to know them, to have assented to them, and are bound by them. While a society remains unincorporated, therefore, it may make regulations *ad libitum* for the discipline of its members including, of course, expulsion, so long as they are not in con-

flict with the law. But the moment it obtains a charter, it parts with the powers it before possessed, and comes under the law which governs corporate bodies.¹ While this power to determine the causes for which a member may be expelled is very extensive, and may be said to be almost beyond the control of the law, yet it is held in check and from abuse by the powerful motive of self-interest. The abuse of the power may be visited upon those who are responsible for such abuse; and hence the compact of association will naturally be formed in a spirit of justice and fairness to the interests of all the members. The members of a voluntary unincorporated society may agree that no associate shall remain a member and enjoy its privileges if he refuses to comply with its rules and by-laws.² Where the rules of an unincorporated society provide that if the society "shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in the society, they shall have full power to exclude such member," the language of these rules gives an unconditional and absolute power to the society to expel a member.³ The rules of a club provided that "it shall be the duty of the committee, in case any circumstances should occur likely to endanger the welfare and good order of the club, to call a meeting, and in event of its being voted at that meeting by two-thirds of the persons present, to be decided by ballot, that the name of any member shall be removed from the club, then he shall cease to belong to the club." The court, in commenting upon the power of this club to expel its members, said: "It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord Eldon,⁴ must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bona fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal. None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would

¹State v. Medical Society, 38 Ga. 608.

²Wood v. Woad et al., L. R., 9 Exch. 190.

³Lewis v. Wilson, 121 N. Y. 284.

⁴While v. Damon, 7 Ves. 35.

induce this court to interfere.”¹ Where the only penalty imposed by the constitution and by-laws of an unincorporated society for an offense is a fine, the expulsion of a member for such an offense is invalid.² The constitution adopted by an incorporated mutual benefit society for the government of its unincorporated subordinate lodges provided: “The manner of suspension for the non-payment of dues and assessments shall be detailed in the by-laws of every lodge, and is left to their option.” It is clear that this provision, which is a part of the fundamental law of every lodge, requires the adoption of by-laws fixing and prescribing the manner of suspending members for the non-payment of dues and assessments, before the power to pronounce a sentence of suspension may be exercised. Such language is imperative and mandatory, and while it leaves the subordinate lodge free to adopt such mode of procedure in the matter as it may see fit, the mode adopted, whatever it may be, is imperatively required to be embodied in its by-laws. Where a lodge has never adopted any by-law on the subject of suspensions as required by this constitution, it has no mode of procedure consistent with, or authorized by, its organic law for suspending persons from membership, and any attempted suspension of a member is, therefore, wholly without authority and void.³ The fact that officers and members of an unincorporated society, as individuals, unite with a society of a similar character, does not vacate their offices or forfeit their membership in the former society, in the absence of a provision in its constitution or by-laws, forbidding them to unite with the second society, and the fact that the constitution and rules of the second society forbid its members to become or continue members of any other local organization, does not affect their relations to the first society.⁴

The rules of a club provided that, in case the conduct of any member, either in or out of the club-house, should, in the opin-

¹ See *Inderwick v. Snell*, 2 Mac. & G. 216; *Manby v. Gresham Life Assurance Society*, 29 Beav. 439; *Lambert v. Addison*, 46 L. T. R. 20; *Lytelton v. Blackburn*, 33 L. T. R. N. S. 642.

² *Otto v. Union*, 75 Cal. 313; 17 Pac. Rep. 217.

³ *District Grand Lodge v. Cohn*, 20 Ill. App. 335.

⁴ *Farrell v. Cook*, 5 N. Y. Supp. 727; *Farrell v. Dalzell*, 5 N. Y. Supp. 729; *Warnebold v. Grand Lodge*, 83 Iowa, 23; 48 N. W. Rep. 1069.

ion of the committee, or of any twenty members of the club who should certify the same in writing, be injurious to the character and interests of the club, the committee should be empowered (if they deemed it expedient) to recommend such member to resign, and, if the member so recommended should not comply within a month from the date of such communication being addressed to him, the committee should then call a general meeting, and, if a majority of two-thirds of that meeting agreed by ballot to the expulsion of such member, his name should be erased from the list, and he should forfeit all right or claim upon the property of the club. A member of the club sent a pamphlet which reflected on the conduct of another member, S., at his official address, such pamphlet being enclosed in a cover on which was printed: "Dishonorable conduct of S." This was brought to the attention of the committee, and they called upon the member to resign, being of opinion that his conduct was injurious to the character and interests of the club. He, however, refused to resign, and a general meeting was called, at which the requisite majority voted in favor of his expulsion. On an action by the member to restrain the committee from excluding him from the club, it was held that the plaintiff having had an opportunity of explanation, the rules having been observed, and the action of the club having been exercised *bona fide*, and without malice, the member was entitled to no relief from the court.¹

§ 74. **Charges against a member of an unincorporated society.**—Whether the moral conduct, or acts complained of as prejudicial to the society, are sufficient to justify expulsion, under the general power of expulsion agreed upon in the constitution of the society, is a matter exclusively for the tribunal hearing the complaint, and not for the court to decide. Such decisions may not be reviewed by a court, or even be considered, unless the alleged cause of expulsion be so trivial, or unimportant of itself, as to suggest that the action of the tribunal was capricious, or corrupt, and not *bona fide*. Whether a certain act or omission is an offense against the laws of the society is a question which the society alone must determine. The society must enact and construe its own laws, and enforce

¹ Dawkins v. Antrobus, 44 L. T. Rep. (N. S.) 557; L.R., 17 Chan. Div. 615.

its own discipline, without the interference of courts.¹ The sufficiency of the charges, when made, in respect to the specification of time, place and circumstance, will not be inquired into by the courts, but must be determined by the society, or the court of the society before which the cause is to be tried. But if courts had the power to determine the sufficiency of the charges in such respects, they would not test the correctness of the charges by the strict rules of criminal pleading, but would hold that, if they are so plainly drawn that the nature of the offense may be understood, they will be sufficient. A society is bound by the exact letter of its rules, and must follow them strictly, when seeking to expel a member for a supposed violation of them. A member was expelled from a society. The club from which he was expelled was a workingmen's club, and the member was also a member of a licensed victuallers' trade protective association. The circumstances under which the plaintiff was expelled by the club committee were as follows: The committee of the club, who had no license for the sale of spirituous liquors, were accustomed to sell spirits and beer in bottles to members, to be either consumed on the premises or taken away. The plaintiff, to test the legality of this course, and by the instructions of his trade protective association, bought a bottle of whisky and another of beer at the club and took them away with him. He then sent a messenger with his member's ticket, to buy a bottle of beer, but he was not served, on its being discovered that the messenger was not a member. The trade protective association took out a summons in the police court against the committee for an infringement upon the licensing laws; evidence was given by the plaintiff in support of the charge, and the committee was held guilty and fined. The plaintiff was then informed that his conduct would be considered by the committee, and they afterward informed him that he had been expelled for breach of the club rules. The only rule which was cited on the hearing of the motion, as having been infringed, was a rule providing that no visitor could pay for any article, and the contention of the club was, that the attempt of the plaintiff to purchase through

¹ Chase v. Cheney, 58 Ill. 509; Wood v. Woad, L. R., 9 Exch. 190; Dawkins v. Antrobus, *supra*.

the messenger was a breach of the rule with respect to visitors. The motion on behalf of the plaintiff was for an injunction to restrain the committee from interfering with his enjoyment of the club property, and the application was granted on the ground that no breach of the rules had been committed.¹ Where, under the powers of the constitution, a member has been expelled by the ministers and elders of a church, for entertaining opinions and promulgating doctrines within the society, at variance with the established belief and subversive of the society, the court will not, in an action of tort for such expulsion, determine whether, or not, the opinions and doctrines of the expelled member were, in fact, inconsistent with the established belief of the society.² Where it was alleged that the offense was committed "at divers times during the two years last past" and "at divers times during the six months last past," the charges were held sufficient in regard to the time laid, as the allegation of the precise time was not essential.³ If a case comes properly before a society on proceedings to expel a member on charges made against him, the society is to judge of the sufficiency of the charges.

§ 75. **Reinstatement to membership in unincorporated society.**—Unincorporated voluntary societies will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where the rule which the member is found to have violated is not contrary to the law of the land, and a member is expelled in conformity with the rules, after proper notice, and the proceedings are regular, and in good faith, no judicial tribunal may interfere with the expulsion. Courts will consider the expulsion of a member from an unincorporated society only to determine three things: first, whether the decision arrived at is contrary to natural justice, as, for instance, whether he had an opportunity to be heard in explanation of his conduct; secondly, whether the rules of the society have been observed; thirdly, whether the action of the society was malicious and not *bona fide*. Courts will not undertake to act as courts of appeal from the decisions of tribunals of unincorporated

¹ 72 Law Times, 183.

Farnsworth v. Storrs, 5 Cush. 412.

² Grosvenor v. United Society, 118

³ Chase v. Cheney, 58 Ill. 509.

Mass. 78; Waite v. Merrill, 4 Me. 102;

societies, but will only determine whether such tribunals have acted *ultra vires*. The court has no right to consider whether what was done was right or not, or even, as a substantive question, whether what was done was reasonable or unreasonable. It may inquire into the reasonableness of the action of the society, and from the want of reasonableness,—from the fact that the action is beyond reason, it may find evidence tending to show bad faith in such action. But mere proof that the action is contrary to reason is no cause or sufficient ground why the court should interfere. Such proof is not a necessary conclusion that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced *aliunde* that, nevertheless, there was no malice,—that what was done was done in good faith.

It is not for the court to decide whether or not it would have arrived at the same conclusion with the society. It will examine into the proceedings and decision of the members, and consider whether or not they are erroneous, only for the purpose of determining whether they are so absurd or evidently wrong as to afford evidence that their action was not *bona fide*, but was malicious, or capricious, or proceeded from some other motive than a desire to exercise fairly and honestly the power given by the rules of the society. The agreement of the associate is, not that he will submit to expulsion if the courts shall say he ought to have been expelled, but that the members of the society, acting in good faith, and according to the rules, may expel him, even though they make an honest mistake in exercising that power.¹ The rights of a person who has been expelled from an unincorporated society are to be determined by the constitution, by-laws and rules of the society. The provisions of such constitution, by-laws and rules must be strictly followed in all proceedings for the expulsion of a member; and a result reached through the violation of them can not be upheld. No member of a society, whether incorporated or unincorporated, should lose his right of membership upon a doubtful construction of the by-laws, rules and regulations of the society. Such by-laws, rules and regulations must be construed liberally, with a view to the maintenance

¹ Dawkins v. Antrobus, 44 Law Times Report (N. S.) 557.

and continuance of the rights of membership; and, in case of conflicting provisions setting forth the member's rights and duties, or the proceedings which may be taken to deprive him of his rights, that provision will prevail which is most favorable to the continuance of his membership. Membership in an incorporated society is a species of property, and, as has been said on a preceding page of this work, the court will interfere to protect that right of membership, even though the society has no property. But the law does not regard membership in an unincorporated society as a valuable right and privilege, and a court will not inquire into the proceedings in expulsion merely to restore a member to the privilege of meeting with the other members of the society. This privilege, however enjoyable and beneficial, has no legal value.¹ As a general rule, therefore, in order to give the court jurisdiction to inquire into such proceedings in expulsion, some allegation and proof must be made showing an injury to the right of enjoyment of the property of the society. He can not, probably, show any severable proprietary interest in the property of the society, but he may show, as has been suggested, a right to the use and enjoyment of it, and a right to a proportionate share of it in case of a dissolution of the association. Where the expulsion has been effected contrary to the general principles of the law, as, for instance, without notice or opportunity to be heard, or for not complying with an illegal by-law of the society, the court will not require a strong showing of pecuniary loss, but will take jurisdiction even where remote, indirect or small pecuniary loss has resulted, or may result to the member.² Where the by-laws provide for the payment of benefits to

¹ *White v. Brownell*, 4 Abb. Pr. N. S. 162. The contrary opinion is expressed in *Stevick on Unincorporated Societies* at § 42, where that author says:

"Suppose a scientific literary association having no property, with no dues or expenses, and whose purpose is to meet weekly to listen to lectures delivered by eminent and learned men, a privilege only to be enjoyed by the members of the association. Such a privilege is property which

can not be accurately reckoned in dollars and cents, and yet if a member was expelled from such an association, without cause, and in direct violation of its constitution, it can not be doubted that a court of equity should interfere to compel the restoration to the member of his privileges."

² *Innes v. Wylie*, 1 Car. & Kir. Rep. 257; *Fisher v. Keane*, L. R., 11 Chan. Div. 353; *Metropolitan Club v. Simmons*, 17 W. N. C. 153.

defray funeral expenses of members and of their wives, the members have a property interest in the society.¹

§ 76. **Proper remedy of expelled member.**—A proceeding may be maintained against the members of an unincorporated society, or against a number of them representing the others when they are too numerous to be joined, by an expelled member thereof, to compel his restoration of membership. The object of such a proceeding is to place him in a position where he can reach the joint property and rights of the association. The propriety of the expulsion may be reviewed in such a suit.² *Mandamus* is not a proper remedy against an unincorporated society for the restoration of an expelled member.³

The supreme court of Michigan has said: "The only ground on which this court can interfere with organized bodies by *mandamus* in aid of a member is that, as corporations, they are subject to our judicial oversight to prevent their depriving members of corporate privileges illegally. Where such bodies are not corporations, or where the question presented does not involve tangible and valuable corporate privileges, we can not interfere in this way."⁴ It is held in several cases that the proper remedy of a member who is about to be illegally expelled from an unincorporated society is by bill in equity seeking to restrain the tribunal from further proceedings in the matter, and that the proper remedy of a member who has been illegally expelled from such a society is by a bill in equity to restrain the officers and members from interfering with his rights of membership.⁵ In one case the action was to have the resolution of expulsion declared null and void, and to restrain the officers and members of the society from interfering with the enjoyment by plaintiff of his rights and privileges as a member; and such relief was granted.⁶

¹ *Lysaght v. Association*, 55 Mo. App. 538.

² *Fritz v. Muck*, 62 How. Pr. 70; *Olery v. Brown*, 51 How. Pr. 92.

³ *People v. German Church*, 53 N. Y. 103.

⁴ *Burt v. Grand Lodge*, 66 Mich. 85; 33 N. W. Rep. 13; 9 West. Rep. 559.

⁵ *Kerr v. Trego*, 11 Wright 292; *Fisher v. Keane*, L. R., 11 Ch. Div. 353; *Metropolitan Base Ball Club v. Sim-*

mons, 17 Weekly Notes of Cases 153; *Labouchere v. Earl of Wharnclyff*,

L. R., 13 Ch. Div. 347; *Kerr on Injunctions*, star pages 545-6-7; *Hassler v. Phil. Musical Association*, 37 Leg. Int. 434; *Leech v. Harris*, 2 Brewster 571; *In re St. Clement's Church*, 28 Leg. Int. 172.

⁶ *Loubat v. Le Roy*, 40 Hun 546; See *Rorke v. Russell*, 2 Lans. 244.

CHAPTER V.

LIABILITY OF MEMBERS.

- § 77. For debts of incorporated society.
- 78. Where attempted incorporation is valid.
- 79, 80. For debts of an unincorporated society.
- 81. Liability of person incurring the debt.
- 82. Where debt is incurred, payable out of special fund.
- 83. Notice of creditors of withdrawal from society.
- 84. Actions for libel and slander.
- 85. Actions between members.
- 86. Liability of members in Pennsylvania.
- 87. Liability of members in New York.

§ 77. **For debts of incorporated society.**—Where a society is incorporated under the laws of a state, the liability of its members for the debts of the society is governed by the provisions of the act under which it is incorporated. But if the organic law of the society makes no mention of such liability on the part of its members, such liability is governed by the general laws of the state upon the subject of corporations. The trustees or directors of an incorporated mutual benefit society are not personally liable for the debts of the corporation, unless they have in some way specially rendered themselves liable for them.¹ It is well settled that where an association which has existed as a mere copartnership becomes incorporated, and the corporation then accepts an assignment of all the property of such association for the purpose of carrying out its object, the members are primarily, and jointly and severally liable for all the debts incurred before the act of incorporation. In such a case, the responsibility of the corporation for debts previously made with the association does not become substituted so as to exempt the members from individual liability. And it does not change the case that the members of the company had it in view to procure a future act of

¹ Wolf v. Schleiffer, 2 Brewster (Pa.) 563.

incorporation, when it was first formed.¹ A man belonged to an incorporated mutual aid society to which he paid certain moneys. These moneys, according to the scheme of the society, were to be paid out again to the various members. Thinking that he had received no consideration for these payments, he afterward brought an action as for money had and received, and sued two of the members jointly with the society. The declaration set out various fraudulent representations whereby plaintiff was induced to make the contract, but its only ground of action was the legal invalidity of the company's promise, the asserted want of corporate power to make the contract of membership according to the scheme. The court below held he had no cause of action, because the contract on its face, and the evidence which he put in, so far identified the plaintiff with the scheme as to prevent him from then complaining of it, as any worse than he had reason to believe it. The supreme court said: "He has joined two separate individuals with the company as having received money to his use. As the ground of action is based on the company's reception of money without consideration, and as by the terms of his contract all money was to be paid over to the company and distributed among the various subscribers, there is no joint liability asserted or made out. Bidwell and French (the members sued) had no joint functions as receivers of money, and most of it was not paid to either. Whatever either or both may have done, they have never held money jointly with the company or with each other. The action is entirely misconceived. It is also apparent from plaintiff's showing that whatever money he paid over was expected to be paid out to other persons and not to be retained, and it is not obvious how this particular action will lie for money which has been disposed of by his consent. We need not, therefore, consider whether he is cut off by his own fault from complaining in any shape for the wrong which he supposes was done him. He can not recover in this particular action."²

§ 78. **Where the attempted incorporation is invalid.**—Articles of incorporation of a mutual benefit society were

¹ Angell and Ames on Corporations at sections 592, 593, 594; Boyles v. McCoy, 37 Tenn. (5 Sneed) 602. ² Murphy v. Bidwell et al., 52 Mich. 487.

duly executed by defendants, and duly recorded with the register of deeds and secretary of state. A member of the society paid his dues, and received a certificate of membership. He received bodily injury entitling him, *as such member*, to pecuniary benefit, and an action was brought against the original signers of the articles of the association as individual persons. The society did not become a corporation *de jure*, not having complied with the statute so as to become an insurance corporation *de jure*, and not being a "benevolent society" under the statute. In deciding that the action would not lie against the defendants as individual persons, the court said: "But notwithstanding it is not a corporation *de jure*, we think it must, at least as between its members, be regarded as a corporation *de facto*. It is manifest that the understanding between the members, and the basis upon which certificates of membership were issued, was that the association was a corporation in fact as it was in form.¹ It never could have been intended or expected that the members of the association, whether original founders—members, like defendant, or those who should become members by joining at any time, should or would be liable as individuals, either jointly or severally, to any particular member who should, by virtue of and under the terms of his membership, become entitled to pecuniary relief or benefit. On the contrary, the intention and real contract was that the association, as a corporation in the contemplation of the parties, *i. e.*, the members, should be liable and the association only. In such a state of facts, though the association is not a corporation *de jure*, and perhaps not for every purpose a corporation *de facto*, it is, as between the members themselves, to be treated as a corporation *de facto*, for that is the way in which the contract of the parties treats it; and the right of a member to pecuniary benefit from the association by virtue of his membership must stand upon the basis that it is a corporation *de facto*. Being presumed to know the significance of his membership, its rights and liabilities, he is estopped to take any other position. This is not only intrinsically just and fair, but it is in accordance with the principles of the authorities.² It is important to bear in

¹ Morawetz, Priv. Corp., § 139. 131, 132, 134, 137; Buffalo & A. R.

² Citing Morawetz, Priv. Corp., §§ 1 Co. v. Cary, 26 N. Y. 75, followed in

mind that no fraud is alleged against defendant; and, further, that this is a case in which a member of the association is seeking relief by virtue of his membership. If the action were between a purported or pretended corporation, which was wholly unauthorized and invalid, and a stranger, different rules and principles might, in some circumstances, be involved.”¹

§ 79. **For debts of an unincorporated society.**—From the cases considered in this chapter it will clearly appear that mere membership in an unincorporated society does not make a member liable for contracts made or an indebtedness incurred by a majority of its members, or a majority of those present, unless the contract of membership, as set forth in its articles of association or by-laws, contemplates the pledging of the credit of all the members, in such a case and for such an object, by the vote and at the discretion of such majority. In the absence of statutory regulations, the liability of the members respectively for contracts made by an unincorporated society, or its committee or trustees, depends upon the principles of the law of agency. In determining the liability of a member of such a society, the question is whether the person by whose act the obligation was contracted was the authorized agent in doing so, of such member. The leading case in England is *Fleming v. Hecctor*.² In this case defendants were sued for wines supplied before its dissolution to the club of which they were members. The rules of the club provided for an entrance fee and an annual subscription; and those who failed to pay the subscription ceased to be members. The rules also provided that a committee should “manage the affairs of the club,” and that members should daily discharge their bills due to the club. The main ground upon which the decision rested was that the plaintiff could not recover unless he showed that the contract upon which he sued was made by a person au-

57, 64, 67 N. Y., and 95 U. S.; *White v. Ross*, 4 Abb. Dec. 589; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Sanger v. Upton*, 91 U. S. 56; *Chubb v. Upton*, 95 U. S. 665.

¹ *Foster v. Moulton*, 35 Minn. 458; 29 N. W. Rep. 155. An association which does business under an unsuc-

cessful attempt to incorporate, is, as to third persons, a partnership, composed not only of the directors, but of the subscribers to the articles. *Field on Corp.*, sections 178 and 179;

Coleman v. Coleman, 78 Ind. 344.

² 2 Mees. & W., 172; 2 Gale, 180.

thorized to contract on behalf of the defendant. The question was, as Baron Parke observed, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered the goods was the authorized agent of the defendant in making the contract.

In *Todd v. Emly*,¹ the evidence was that a club was formed, and a fund subscribed which was to be administered by a committee. It was held that the committee must be supposed to have agreed to do that which the subscribers to the club had power themselves to do, that was, to administer the fund so far as it went, and not to deal on credit, except for such articles as it might be immediately necessary for them to have dealt for on credit. There being no other evidence to connect the transaction with the defendants than that they were members of the general body of the committee, the question for the jury was, not whether defendants by their course of dealing had held themselves out as personally responsible to the plaintiff, but whether they had individually authorized the making of the contract in the ordering of the wine.² In the application of these principles it has been held that a general rule, vesting the conduct of all the concerns of the club in a committee, does not authorize the committee to raise money by debentures, or otherwise to pledge the credit of members. In *In re St. James Club*, it was said: "It is very clearly settled that no member of a club is liable to creditors of a club, except so far as by contract or dealing he may have made himself personally liable; and this is mere common sense, for if a member paying his annual subscription and paying for the articles which he orders in the club, was also liable to pay the person who supplied the club with those articles, who would belong to a club?"³ Sundry persons raised by voluntary subscription among themselves a sum of money to erect a building for an academy, and then held a meeting, at which they chose one of their number an agent "to employ workmen, procure materials," etc., and this agent hired the plaintiff to labor in the erection of the building. It was held that he bound all the subscribers, including him-

¹ 7 Mees. & W., 427; 8 Mees. & W., 505.

³ *In re St. James Club*, 13 Eng. L. & Eq. 589; 16 Jur. 1075.

² See 4 Abbott's New Cases, p. 300.

self, and that an action might be maintained against all the subscribers jointly.¹ All the members of an unincorporated society who assent to an undertaking whereby a debt is incurred, or who subsequently ratify it, are liable for the payment of the debt.² Subsequent ratification is equivalent to prior authorization of the acts of an agent. No new consideration is necessary to support it.³ There are, doubtless, cases in which the act done by the officer or committee of the society is so clearly in furtherance of the objects for which the association was organized that all the members will be presumptively bound by it. Whether the liability of the members for such act is to be presumed, must be determined by the court from an inspection of the articles of association. But when such is not the case, consent or ratification must be proved. It is for the jury to say whether the debt was contracted by the society with the previous concurrence or subsequent approbation of the defendant. So far as the evidence of agency goes, a course of dealing may amount to proof of original authority. The fact that a member of a society recognized as correct a bill against the society for work and labor done, goes to show that he knew that the work was being ordered in the name of the society. The evidence of ratification, even though doubtful, and susceptible of different interpretations, is properly submitted to a jury; and slight circumstances and small matters are sometimes sufficient to raise a presumption of ratification.⁴ Where a club is formed for the purpose of buying goods at wholesale prices out of paid-up subscriptions, in order to enable members to obtain the benefit of the lower prices of such goods, members are not liable for goods purchased on credit by an officer not authorized to contract on credit.⁵ But where the contract of association and the agreed basis of making such purchases show that the officer is clothed with a discretion to contract on credit for the benefit of the society,

¹ Robinson v. Robinson, 10 Maine, 240. ney v. Strickland, 2 Stark. N. R. C. 416; Sheehy v. Blake, 77 Wis. 394;

² Ash v. Guie, 97 Pa. St. 493; 39 Am. Rep. 818; Ridgely v. Dobson, 3 Watts & Ser. (Pa.) 118; Lewis v. Tilton, 64 Iowa, 220; 52 Am. Rep. 436; Eichbaum v. Irons, 6 Watts & S. (Pa.) 67; 40 Am. Dec. 540; Delan-

46 N. W. Rep. 537.

³ Ferris v. Thaw, 72 Mo. 446.

⁴ Eichbaum v. Irons, *supra*; Richmond v. Judy, 6 Mo. App. 4 5.

⁵ Wood v. Finch, 2 F. & F. 447.

the members are liable for such contracts made by the officer.¹ Under a by-law of a society giving certain powers to a standing committee, and power "generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal," the committee can not bind the members of the society to pay debts which it may contract, unless such members consent to or approve the incurring of such debts.² A member of an unincorporated voluntary society is not liable for a debt incurred by a committee of the society, if it does not appear that the member was present at the meeting appointing the committee, and there is no evidence of the authority of the committee to incur the debt, or of the obligations and duties of the members of the society.³ Members of an unincorporated society are not liable for its debts to which they did not assent expressly or by necessary implication. If an officer who has been authorized by the members of an unincorporated society to execute a promissory note for a debt of the society, executes it in his own name, the members of the society may be sued on the note, whether the officer discloses his agency or not, unless it is clear that both parties to the note intended that the officer alone should be liable. Parol evidence is admissible to establish the intention of the parties, as this evidence does not contradict that which is written, but only serves to show that others than those mentioned on the face of the paper are bound also, since the act of the agent is that of his principal. The liability of the principal depends on the act done, and not merely on the form in which such act finds expression.⁴ Where certain persons are, by an unincorporated society, appointed the "trustees of its property and effects," they are the general agents of the members for the management and control of its property and effects. They do not, as a matter of law, stand in the relation of principals to other agents appointed by the society to perform some particular duty in respect to such property, nor are they liable for any debt incurred for its im-

¹ Cockerell v. Ancompte, 40 Eng. L. & Eq. 284; 3 Jur. N. S. 844. ⁴ Ferris v. Thaw, 72 Mo. 446; Story on Agency, §§ 160, 270; Burls v.

² Child v. Society, 144 Mass. 473; 11 N. East. Rep. 664. Smith, 7 Bing. 705.

³ Volger v. Ray, 131 Mass. 439; Burt v. Lathrop, 52 Mich. 106.

provement, except such as may have been made at their request, either express or implied.¹

There is no legal distinction, in respect to liability for the debts of an unincorporated society, between an officer and a mere member, where neither contracted the debt or authorized another to represent him in the transaction.² It is not necessary that the agency of the person who incurs the debt should be evidenced by any minutes of the meetings of the members of an unincorporated society. There is no adjudication which requires such a verification of the joint acts of the members or a part of such members, but many cases have arisen in which such a doctrine might have been held if it had been the law. There is, undoubtedly, much convenience in the making and preservation of minutes of proceedings in such societies, but the acts of the members may be shown in the delegation or ratification of power to a third person to incur debts on their behalf. The subsequent acts of a member in the ratification of the acts of a third person in incurring debts on behalf of the society may be shown to bind him. In an action against the members of an unincorporated society for work and material furnished in fitting up the room in which the society held its meetings, parol evidence that the defendants, at one of the meetings, passed a vote authorizing one of the members to procure the work and materials, which he afterward ordered of plaintiff, is competent to show that the other defendants were jointly liable with him; and the fact that one of the defendants, who acted as clerk of the meeting at which such vote was passed, had since destroyed the informal minutes which he had taken for the purpose of preparing a record, does not preclude the plaintiff from showing that such a vote was passed, and that defendants participated in it or assented to it.³ In an action against defendant upon his partnership liability as a member and officer of an unincorporated fair association to recover premiums awarded by it, he denied that he was either an officer or member. It appeared that there was no express agreement as to the organization thereof, but he contributed money in its support, and

¹ Devoss v. Gray, 22 Oh. St. 159.

² Newell v. Borden, 128 Mass. 31.

³ Central City v. Walker, 66 N. Y. 424; Wolf v. Schleiffer, 2 Brewster (Pa.) 563.

in the newspaper advertisements, which ran from April to September, he was designated as its vice-president. He took one of these papers, but said he had no recollection of seeing his name in that connection. At the fair he acted as a judge of the races, but said he did so only at the solicitation of the manager of the department. He also collected some money to pay the association's bills. This was held to be sufficient to warrant a finding that he acquiesced in this use of his name, and to support a verdict against him. It was proper to submit to the jury the question whether defendant was a member of the association, as well as the question whether he acquiesced in the use of his name as vice-president.¹

Where members were notified to attend meetings called by the directors to consider the matter of paying off an unauthorized indebtedness, they can not be held to have assented to and ratified the creation of the debt, merely because they failed to attend such meetings.² There is a rule of law which requires that all persons, to whom a trust is committed, must confer and act together, but this rule does not apply to agents appointed to perform ministerial duties. Where the members of a society appoint a committee of two or more members to purchase property for the benefit of the society, it is not necessary that all the members of the committee should be corporeally present when the purchase is negotiated and made, in order that such members of the society shall be personally liable for the act. The duty in such case is strictly ministerial, and ministerial officers may, in general, depute their powers to one another or to a third person.³

§ 80. A learned writer has said:⁴ "No partnership or quasi-partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts. * * It is a mere abuse of words to call such associations partnerships, and if liabilities are to be fastened on any of their members, it must be by

¹ Murray v. Walker, 83 Iowa 202; 554; Downing v. Rugar, 21 Wend. 48 N. W. Rep. 10. (N. Y.) 178.

² McFadden v. Leeka, 48 Ohio St. 513; 28 N. East. Rep. 874. ⁴ Lmdley on Partnership, Vol. 1. p. 57.

³ Wells v. Gates, 18 Barb. (N. Y.)

reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association.”¹ Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum.² In such societies, each member acts for himself only. The members of an unincorporated society are not liable to an action at law by the father of a deceased member, by reason of a provision in their constitution that “in case of the death of a brother, there shall be allowed from the lodge a sum of not less than thirty dollars, to defray the expense of burial; which shall be paid over without delay to the deceased brother’s nearest of kin.” The court said: “The constitution and by-laws of the lodge, treating them as articles of a voluntary association, do not amount to a promise to each member by all the rest to pay him anything. The stipulation in the by-laws is that, on the death of each member, there shall be allowed from the lodge a sum not less than thirty dollars, to defray the expense of burial, to be paid without delay to the deceased’s nearest of kin. The payment is for that purpose. It is, if any promise at all, a promise by each member to contribute by periodical and other payments toward a certain fund for all the purposes contemplated by the association, including money to be paid promptly for the expenses of burial, to be done usually before letters testamentary, in case of a will, or letters of administration, in case of intestacy, can be regularly issued. In other words, the promise of each member is to pay money to the lodge, and the lodge, not being incorporated, can maintain no suit. If it creates any right which can be recognized by law, it is an equitable right only to a share in a common fund, raised either for purposes purely charitable, or for their joint benefit, and can only be enforced in equity. And if there were any ground for such equitable relief, as in case of partners in a joint fund raised for a

¹ See *Richmond v. Judy*, 6 Mo. App. 400; *Gray v. Pearson*, L. R., 5 C. P. 465. 568; *Andrews and Alexander’s case*,

² See *Strong v. Harvey*, 3 Bing. 304; 8 Eq. 176; *Burt v. Lathrop*, 52 Mich. *Redway v. Sweeting*, L. R., 2 Exch. 106; *Kuhl v. Meyer*, 35 Mo. App. 206.

special purpose, of which we give no intimation, such equitable relief could be sought only by a member or his legal representative. But supposing this stipulation in the constitution and by-laws of the lodge to amount to an express promise to pay thirty dollars upon a certain contingency, there is no consideration for such promise moving from the plaintiff to the defendant, or from any person acting in privity with him or acting for his use or benefit, or with an intent and purpose to obtain a benefit to the plaintiff. There is no ground to infer from the facts agreed, that the son, who was a member of the lodge, in paying his contributions thereto had any purpose of obtaining money from the lodge, in case of his death, for the use of his father, or other next of kin, for his own benefit; to whomsoever it might be paid, under these provisions, it was a naked trust for defraying the charges of his burial. It is, therefore, not at all analogous to the case where A owes B and B owes C, and in consideration that B will release A, he promises to pay C. Such promise is valid, and C may sue A upon it. The reason is, that, although the consideration for A's promise to C does not move from C, it moves from A for C's use and benefit."¹ In one case the proof showed that some young men organized a society for acting plays, and that they rented a house for that purpose, and agreed to pay the landlord six dollars a month rent for every month they should so occupy it. Barry became a member of the society some months after the contract. The court was requested to charge the jury, that if the contract was made before Barry became a member of the society he was not bound by it. This the court refused, and charged that in such a case he would not be bound for the previous, but would be for the subsequent rent, and the jury found accordingly. This was erroneous under the state of the pleadings. If Barry was liable at all for the rent after he became a member of the society, it was not upon a count framed upon the contract originally made, nor upon an *indebitatus* or *quantum meruit* count for work and labor done, but upon a count for use and occupation.²

§ 81. **Liability of the person incurring the debt.**—An

¹ Payne v. Snow, 12 Cush. (Mass.) Huntp.) 324; see Cohn v. Borst, 36 443.
Hun (N. Y.) 562.

² Barry v. Nuckolls, 21 Tenn. (2

unincorporated society can not be a party to a contract, or to an action at law. The persons contracting in the name of such an organization are themselves personally liable, either as being themselves in fact principals, or as holding themselves out as agents for a principal which has in law no existence. They are liable for debts contracted by them in the name of such society with a stranger, in the absence of any agreement or understanding of the parties to the contract that they shall not be personally liable for such debts.¹ It is a general principle that, although a party may be a mere agent, and known to be such, yet if he contracts in his own name, or in his name as agent, when his principal is incapable of contracting, or is irresponsible, the law presumes that he intended to bind himself.² The justice of this rule rests on the principle that otherwise the party performing the service would be remediless. If the agent in such a case would stand exonerated, he must disclose a responsible principal, or, by contract, exempt himself from personal liability. It is not necessary that the person incurring the debt for the benefit of an unincorporated society should know and believe at the time that he is incurring a personal liability or indebtedness. It does not alter the question, that he at the time contracted *as an officer* of the society. His liability springs from the fact that he had no principal, no legal association or body which he could represent, act for or bind, and he must be held in such a transaction, at least as against a stranger, to have represented, acted for and bound only himself, in the same manner and to the same extent as if there had been no assumed authority to act for such society.³ Where a person contracts a debt for such a society, and as an officer thereof, the termination of the term of his office does not relieve him from liability. Having contracted the debt, he is bound to pay it, and his successor in office is not a successor in that sense which renders him liable on the contracts of his predecessor.⁴

In one case it was held that where the committee of a vol-

¹ Lewis v. Tilton, 64 Iowa 220;

Heath v. Goslin, 80 Mo. 310; 50 Am.

Rep. 505; Doubleday v. Muskett, 7

Bing. 110; Blakely v. Bennecke, 59

Mo. 193; Eichbaum v. Irons, 6 Watts

& Ser. (Pa.) 67; 40 Am. Dec. 540.

² Story on Agency, §§ 281, 282.

³ Fredenthal v. Taylor, 26 Wis. 286;

Blakely v. Bennecke, 59 Mo. 193,

supra.

⁴ Sizer v. Daniels, 66 Barb. (N. Y.)

427.

untary society entered, as such, into a contract for business to be done on behalf of the society, the funds proving insufficient, all the acting committee were personally answerable, on the ground that the credit must fairly be presumed to have been given to them rather than to the subscribers at large.¹ Where four members of an unincorporated church society signed a call to a pastor, agreeing to pay him one thousand dollars per year for his services, and he accepted the call and performed the services as pastor of the church, the signers of the call were held personally liable for the promised salary.² The members of a committee appointed by an unincorporated society to make arrangements for a public exhibition are individually liable for work necessary for the occasion, which a sub-committee of their number procures to be done, although in making the contract the sub-committee assumed to act as officers of the association.³ Such a rule is salutary, and tends to the promotion of justice, by preventing the procurement of services from too incautious laborers, and of goods from too confiding merchants, by putting forward an irresponsible committee to act for an irresponsible public gathering. Where a person expressly permitted his name to be used as a member of a committee of arrangements for a ball to be given by an association, and subscribed to some of the preliminary expenses, but took no further part, and did not attend the ball, it was held that he was not liable for the cost of a supper provided for the occasion without his knowledge or consent.⁴ In an action against a person who has incurred a debt on behalf of the society, it is always competent for him to show that the debt was contracted on the credit of the funds of the society, and not on a footing of his personal liability. If the plaintiff, by his contract, has trusted solely to the state of the funds, and this has been shown, the member acting on behalf of the society is not liable unless the funds have been collected.

§ 82. **Where debt is incurred, payable out of the funds of the society.**—Where a contract is made between members of a society and a third person, by which the members agree

¹ Cullen v. Duke, 1 Brown's Ch. 101. 540, *supra*; McCartee v. Chambers, 6

² Thompson v. Garrison, 22 Kan. Wend. (N. Y.) 649.
766.

⁴ Downing v. Mann, 3 E. D. Smith's

³ Fredendall v. Taylor, 23 Wis. Rep. (N. Y.) 36.

to pay a certain sum out of the funds of the society, when they shall have funds applicable to his demand, the conditional contract becomes absolute, and an action may be maintained against the members, so soon as they receive such funds in the society.¹ When an association consists merely of subscribers to a fund for a common object, and is not a partnership, it is competent for the members of the association to contract expressly on the credit of such fund, and to limit their liability to the amount of such fund, which may be applicable to the particular debt.² But when an association, which is under its rules and scheme a partnership, executes a note containing a promise to pay "out of their joint funds, according to their articles of association," the members are personally liable unless it appear unequivocally that the payee, knowing the force and effect of such a stipulation, agreed to look solely to the partnership fund for payment.³ Partners are personally liable for the debts of the partnership, and the limitation of their liability is viewed with disfavor by the law, both on account of the opportunity afforded by such limitation for fraud upon unsuspecting persons, and because such limitation seeks to give to partnerships the exemption and shield of corporations. In the case of simple contracts, where the party has looked to the anticipated realization of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he can not enforce payment from individuals; and if the project miscarries, and funds are not realized, he has no claim upon anybody or for anything.⁴

§ 83. **Notice to creditors of withdrawal from the society.**—Where a body of men associate themselves for social intercourse and pleasure, and assume a name under which they commence to incur liabilities by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise, if a creditor continues to fur-

¹ Higgins v. Hopkins, 3 Exch. 162. ⁴ 1 Addison on Contracts, pg. 289*.

² Landman v. Entwistle, 7 Exch. 186 Abbott's notes.
632.

³ Hess v. Werts, 4 Ser. & R. (Pa.)
356.

nish, in good faith, articles such as have been previously purchased for the use of the society, his responsibility will continue, upon the same principle which holds retiring partners to liabilities for an indebtedness subsequently contracted with former creditors.¹ And the fact that a member moves away from the town or city in which the society meets and has property, is not of itself an abandonment of membership and a notice of withdrawal.²

In *Park v. Spaulding*,³ defendant was a member of the club at the time the account was first opened with the plaintiffs. He was one of the committee who made the first purchase of the plaintiffs, and he never notified plaintiffs at any time of his withdrawal from the club. The goods thus purchased were sent to the club-house, and came into the possession of the steward, who subsequently paid the plaintiffs the amount of that bill. He thereafter continued, as such steward, to act in making purchases from time to time in the name of the club; and, although a private arrangement existed by which the steward had agreed to make these purchases himself, and to furnish the articles to the members of the club on his own account, yet this arrangement was never communicated to the plaintiffs. Upon these facts the defendant was held liable for the debts contracted by the steward in the name of the club.

§ 84. **Actions for libel and slander—Privileged communications.**—All communications by members of corporate bodies, churches and other voluntary societies, addressed to the body or any official thereof, and stating facts which, if true, are proper to be thus communicated, are privileged. They are not absolutely privileged, so that no action will lie, even though it be averred that the injurious publication was both false and malicious, but are conditionally privileged to this extent, that the circumstances are held to preclude any presumption of malice, but still leave the party responsible, if both falsehood and malice are affirmatively shown.⁴ Words spoken or written in the regular course of church discipline, or before a tribunal of a religious society to or of members of the church or society, are, as among the members themselves,

¹ *Park v. Spaulding*, 10 Hun 128;
Tenney v. Union, 37 Vt. 64.

² *Tenney v. Union*, *supra*.

³ 10 Hun (N. Y.) 128.

⁴ *Cooley on Torts*, pg. 211-215; *Van Wyck v. Aspinwall*, 17 N. Y. 190.

privileged communications and not actionable without express malice.¹ Among the powers and privileges established by long and immemorial usage, churches have authority to deal with their members for immoral and scandalous conduct, and for that purpose to hear complaints, to take evidence and to decide, and upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction every member, by entering into the church covenant, submits, and he is bound by his consent.² When a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, the sentence may, nevertheless, be promulgated by being read in the presence of the congregation.³ Where an incorporated society has no jurisdiction to expel a member upon a certain charge which has been preferred against him, its proceedings in such a case are *coram non iudice*; and if the charge made against the member is libelous under ordinary circumstances, a resolution adopted and entered in the minutes of the proceedings, expelling the member for such cause, is a libel, and the member introducing it is liable to an action.⁴ Where a report is made by a subordinate lodge to the grand lodge of the order, in accordance with the usual rules, regulations and customs of the order, by a member of a special committee thereof, to which was referred a petition respecting the expulsion of a member of the order from a subordinate lodge, justifying the subordinate lodge in expelling the member for perjury, and setting forth that the officers of the subordinate lodge were unanimously of the opinion that the statements sworn to by such member in a petition presented by him to the grand lodge, were all infamously untrue, and where the report is received and adopted by the lodge in the usual course of its business, and thereafter is printed and published in a pamphlet entitled "The Grand Lodge Journal of 1873," in connection with the general and ordinary transactions of

¹ Hilliard on Torts, 355; Lucas v. Stevens, 51 Vt. 501; 31 Am. Repts. Case, 9 Bush (Ky.) 297; Kershaw v. 698, note.

Bailey, 1 Exch. 743.

² Farnsworth v. Storrs, 5 Cush.

³ Remington v. Congdon, 2 Pick. (Mass.) 412.

(Mass.) 310-315; O'Donaghue v. Mc-⁴ Fawcett v. Charles, 13 Wend. Govern, 23 Wend (N. Y.) 26; Servatius v. Pichel, 34 Wis. 292; Shurtleff

the lodge, and in the usual manner of printing and publishing the journal of the records and proceedings of the lodge, for the use of the members of the order, such publication is *prima facie* privileged. In such a case the occasion and manner of the publication prevent the inference of malice, which the law draws from unauthorized communications, and afford a qualified defense, depending upon the absence of actual malice. In such a case, where the publishing is conditionally privileged, and where the circumstances of such publication are such as to repel the inference of malice, and exclude any liability of the defendant unless upon proof of actual malice, the burden of proof upon the trial, as to whether the defendant was actuated by actual malice, is upon the plaintiff. If the plaintiff gives no evidence of express malice, the defendant is entitled to a verdict.¹

In an action for slander the defendant set up as a defense, that plaintiff and defendant were, at the time of the alleged publication, members of an association known as the Independent Order of Odd Fellows; that the acts charged in the alleged libel were violations of the laws of said order; and that the publication complained of was a presentment to the lodge, of which both parties were members, of the charges, for the purpose of having the truth thereof inquired into, and of having the plaintiff dealt with according to the laws of the order. The court said: "The law protects the defendant so far as not to impute malice to him from the mere fact of his having spoken words of the plaintiff, which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to sustain his action for slander if he can satisfy the jury by other proofs, that there was actual malice on the part of the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. * * The law simply requires that there should not be a want of common honesty in preferring the charge."² This rule is stated in Addison on Torts: "Whether the circumstances under which a communication was made constitute a privileged communication or not, is a question which the court has assumed the jurisdiction of determining,

Kirkpatrick v. Eagle Lodge, 26 Kan. 384. ²Streety v. Wood, 15 Barb. (N. Y.) 105.

but if there is any dispute about these circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communications, under whatever circumstances made, should be believed to be true by the party making them; for a person can not shelter himself under privilege, if he believes the charge imputed untrue, unless he at the same time declares his belief in its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds."

In *De Sénancour v. Société La Prévoyance*,¹ it is said: "The defendant corporation appointed a committee to investigate certain bills presented by the plaintiff, without specially directing or authorizing them by any vote or regulation of the corporation to make their report in print; and, in the absence of any usage to that effect, there was no express or implied authority to the committee to make or circulate a report on a subject of this nature in print. Such an act can not be said to have been done in the due course of their employment, there being nothing to show or to raise any inference that the corporation had any reason to expect or understand that it would be so done. The committee, however, made a report in print at a regular meeting, by placing on the secretary's desk printed documents or reports, which were then freely taken from the desk by members present in the meeting, and which were libelous. In all this there was nothing for which the corporation was responsible. It was only the individual acts of the committee, and of certain members. The omission of the secretary to prevent members from taking the report from his desk, was not sufficient, as matter of law, to put upon the corporation the responsibility for their circulation. All that the corporation did at that meeting in respect to the report was to vote to hold a special meeting to pass upon its adoption. At the next meeting the corporation voted to adopt the report, but this was not a publication of it, and no fact is stated which shows that the corporation gave to the report any currency or circulation, or any sanction to its previous circulation. It is not as if the corporation, after adopting the report, had circu-

¹ 146 Mass. 616; 16 N. East. Rep. 553; 6 N. Eng. Rep. 270.

lated it.¹ Under these circumstances, there was no evidence of any publication of the libel by the defendant. The court did not reach the question of privilege, having disposed of the case on the ground that there was no publication; and that question, therefore, is not to be considered here." An action for slanderous words spoken of and concerning the plaintiff by an unincorporated mutual benefit society, of which he was a member when the alleged tort was committed, will not lie against the society sued as a partnership, but the redress, if any, is against the wrong-doers in their individual or non-partnership capacity. Nor does it make any difference in this respect that, in consequence of the slander, the plaintiff was suspended from the benefits of membership for a term of years, and that the action was brought pending this term of suspension. In discussing this question the supreme court of Georgia said: "If, as the declaration alleges, the association was a partnership, the plaintiff was a member of it, and after diligent search we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle, we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as part owner of the same. Nor can we see how he can escape the general rule that, in an action at law against a partnership, all the partners, so far as the partnership assets are involved, must be defendants. That rule, applied to this case, would require the plaintiff to sue himself. The equity powers of the court can not be invoked to overcome this obstacle, for a court of equity has not, nor never had, jurisdiction to decree damages for defamation or slander."² Where, by statute, suits are permitted by or against a treasurer of an unincorporated society, with like effect as if all the members are or were sued, "as regards the joint rights, property and effects" of such society, it is doubtful whether such statute covers a suit for libel published

¹ *Railroad Co. v. Quigley*, 21 How. 202; *Railway Co. v. Conybeare*, 9 H. L. Cas. 711, 725. ² *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284; 4 S. East. Rep. 905.

by a society, and whether it is not confined to the assertion of property rights, strictly so called.¹

§ 85. **Actions between members.**—In determining the proper remedy of members of an unincorporated society against each other, it is necessary to inquire whether the rules and scheme of the society create a partnership or quasi-partnership between the members. If the liabilities which the rules and scheme create are those in the nature of copartnership, the member must seek his remedy against his fellow-member under the laws of partnership, and in all matters growing out of the relation of such membership, the only remedy is by bill in equity, or action of account.² If an officer of the society order goods for the society from a fellow-member, the solution of the question of the personal liability of the officer is not to be found by examining the cases with reference to the liability of officers and members in their dealings with third persons, but by looking at the rules of the society, to see what are the liabilities which they create. If it be found that, by becoming a member, the seller did not lose his right of action against any other member for goods sold, although they were bought for the purposes of the society, he may sue the purchaser and those consenting to or approving the purchase; and the only question which can then arise in the case is, whether the seller contracted to supply the goods on the credit of the purchasers, or whether he looked to the funds of the society for payment; and this is a question of fact for the jury to determine. These principles are clear, but the application of them to the facts in each individual case is exceedingly difficult.³ Where the person incurring the debt on behalf of the society and the person with whom the debt is incurred are both members of the same unincorporated voluntary society, and where the nature of the agency, and the extent of the powers of the representative of the society are known to the creditor, such representative or agent is not individually liable for the debt. A member of a voluntary society formed for building a meeting-house, who is appointed one of the building committee, and

¹ *Duncan v. Jones*, 32 Hun 12; *son* (N. Y.) 401; see *Chambers v. Cal-Rorke v. Russell*, 2 Lansing (N. Y.) 18 Pa. St. 13.

244.

³ *Caldicot v. Griffith*, 22 Eng. L. & Eq. 527; 8 Exch. 898.

acts as such in making contracts and procuring materials for the building, is not individually liable to pay for services for which he thus contracts with a member of such society, who knows his agency, and who knows that the contract is for the benefit of the society, and that it is entered into by him merely as such agent.¹ In one case it was said: "The subscribers to the articles of agreement, not being constituted a society under the statute with corporate powers, but being a mere voluntary association of individuals, the question is whether the defendants, who acted as their committee in superintending the building of the meeting-house, were personally answerable for the services performed by the plaintiff upon it. It does not appear that the defendants made any express promise, or pledged their individual credit and responsibility, so as thereby to impose a personal obligation upon themselves; nor does it appear that any moneys were in their hands, or that any funds remained at their disposal to answer or pay for the services. They were appointed by the body of the subscribers to execute a mere trust; were bound to act under the direction and control of the subscribers, and liable to be removed at their pleasure; and it appears that one of them was in fact removed and another appointed in his place. The plaintiff was one of the subscribers by whom the defendants were appointed; and, in the absence of any express contract or undertaking, he can have no legal or equitable right to look to the personal security or liability of the defendants, and hold them answerable out of their private funds for work done by him for the benefit of the subscribers generally. Indeed, as the subscribers to the articles of association were all equally interested in building the meeting-house, and the plaintiff and the defendants were members of the association, the case seems to fall within the rule that one of several persons jointly concerned in a common purpose can not maintain an action against all or any of the others for work and labor performed for their joint benefit. In *Holmes v. Higgins*,² where a number of persons associated together for the purpose of obtaining an act of parliament and making a railway, and subscribed for shares of £50 each, it was held that they were partners in the undertaking, and that

¹ *Abbott v. Cobb*, 17 Vt. 593.

² 1 Barn. & Cres. 74.

a subscriber, who acted as their surveyor, could not maintain an action for work done by him in character, against all or any of the subscribers."

Where the defendant purchased a steamer, and had it repaired, in the expectation of selling it to an association of which he and the plaintiffs were, or were to be, members, he was held liable in an action at law to the plaintiffs, for such repairs, whether the vessel was sold to and employed by the association or not. But if the repairs were made by the plaintiffs upon an agreement or understanding between the defendant and the plaintiffs, that the association was to pay, or that the plaintiffs should look to the association for payment, then he is not liable therefor in such an action. Where the question is, on whose credit was the labor done and materials furnished, each party has the right to ask for instructions based on his view of the case, if the evidence relied on be legally sufficient to warrant the conclusion sought to be deduced from it.¹ An action at law will not lie by one member, in his right of membership and as the assignee of other members, against a contractor with the association, who is also a member, upon his contract with the society. No member has an interest in the property and effects of the society, which can be separated and taken out of the whole for his sole use, until the joint affairs are settled, the society dissolved, the mutual rights of the members adjusted, and the ultimate share of each determined. In any agreement made by a contracting party with the association as such, and in any right of action arising thereon, each member has an interest, but no member has an interest which he can transfer, so that an action can be maintained by his assignee. In such an agreement the defendant member has as great an interest as any other member. A court of equity, with all the parties before it, can grant appropriate relief in such cases.² Where the constitution of an unincorporated society defined its object to be to stimulate a healthy interest in the breeding and management of pigeons and bantams, and to disseminate useful knowledge in relation thereto, gave the board of directors the charge and management of all public exhibitions of the society, and provided that each member should pay an initiation fee and an annual assessment; and

¹ Wells v. Turner, 16 Md. 133.

² McMahon v. Rauhr, 47 N. Y. 67.

the society held a public exhibition and awarded premiums, and the expenses, including premiums, were greater than the receipts, a bill in equity may be sustained by those members who paid the deficiency, against other members for contribution, if the defendants participated in a vote to give the exhibition with premiums, or if they assented to such vote.¹

§ 86. **Liability of members in Pennsylvania.**—In Pennsylvania it was held that members of an unincorporated mutual benefit society were jointly and severally liable to pay sick benefits to co-members, but the act of April 28, 1876, of that state, declares that members of beneficial societies "shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the lodge or other organizations," and provides that "the same shall be payable out of the treasury of such lodge or organization." Notwithstanding the above act, such associations still continue to be partnerships. The act simply limits the remedy. It exonerates the members from all individual liability, and confines the execution to the partnership property. An action at law may be maintained against the members, but the remedy is limited.²

§ 87. **Liability of members suspended by statute in New York.**—The New York Code of Civil Procedure, at section 1919, provides that an action or special proceeding may be maintained against the president or treasurer of an unincorporated association, consisting of seven or more persons, upon any cause of action upon which the plaintiff may maintain such an action against all the associates by reason of their interest or ownership, either jointly or in common, on their liability therefor, either jointly or severally. Any partnership or other company of persons which has a president or treasurer is deemed an association within the meaning of this section. When an unincorporated association, consisting of more than seven members, has been formed, and has adopted by-laws and elected

¹ Ray v. Powers, 134 Mass. 22; see Notes of Cases (Pa.) 317; Kurz v. also Tyrrell v. Washburn, 88 Mass. Eggert, 9 Id. 126; Paul v. Keystone 466; Murray v. Walker, 83 Iowa 202; Lodge, 3 Id. 408; Commonwealth v. 48 N. W. Rep. 10.

² Pritchett v. Schafer, 2 Weekly

Volz, 14 Id. 289.

a treasurer, an action can not be maintained against the individual members thereof upon a debt due from the association, unless an action has first been brought against its president or treasurer, as prescribed by this section.¹

¹ Flagg v. Swift et al., 25 Hun (N. Y.) 628; see Tibbits v. Blood, 21 Barb. 623, criticising and distinguishing 650, and Schmidt v. Gunther, 5 Daly Park v. Spaulding, 10 Hun 128; With- 452; McCabe v. Goodfellow, 15 N. Y. erhead v. Allen, 4 Abb. Ct. App. Dec. Supp. 377.

CHAPTER VI.

SUITS BY OR AGAINST AN UNINCORPORATED SOCIETY.

- § 88. Proper parties to an action.
- 89. Actions by society or a member to recover property.
- 90. Right of society to exclusive use of its name.
- 91. Injunction restraining libel on society.
- 92. Judgment against an unincorporated society.

§ 88. **Proper parties to actions.**—The old rule was that, in suits by or against an unincorporated voluntary society, whatever the number of its members, or the nature or extent of the objects undertaken, the society was looked upon as in the nature of a partnership, and all the members were necessary parties. But by statute, both in this country and in England, this rule has been modified to suit the exigencies of modern practice. It would serve no useful purpose to recite in this treatise the exact changes which each state has made in the old rule, and it is only necessary here to state the modern, sometimes called the equity rule. If the members of the society are so numerous that they can not be made parties to the cause with any chance of bringing it to a hearing, in consequence of abatements and like difficulties, suit may be brought in the name of one or more for the use of all, or two or three members may be made defendants to represent the interests of all.¹ If there should be two or more classes of members who have separate or conflicting interests, then a small number may be selected from each class to represent that interest in the same way as if the whole class had been brought before the court. It sometimes happens that there is a class of members in a society who have conflicting interests with the others; then the plaintiffs, if the class to which they belong is very numerous, put forward two or three of their number, who sue on behalf of themselves and all the others

¹ *Liggett v. Ladd*, 17 Oregon, 89; 21 Pac. Rep. 133.

of that class, and make the other members defendants, who have conflicting interests; or, if the defendants are numerous, make some of them defendants on behalf of the rest.¹ A statute provided that "when the question is one of a general or common interest of many persons, or where the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the whole." Plaintiffs sued "on behalf of themselves and the other stockholders of the association, who may come in and contribute to the expense of the suit." The court held that the complaint showed a compliance with the statute, and said: "If the plaintiffs could have required from all other parties interested who may come in and avail themselves of the benefit of the action, to contribute to the expense, stating this condition in the complaint can not affect their rights in this particular, or prevent them from prosecuting the action. The liability to share the expense was the practice in the court of chancery; it has not been abolished, or in any way affected by the recent legislative changes in our practice. * * One or more parties, therefore, of a numerous class, have a right to state that they sue for the benefit of the whole, or of those interested, who may come in and contribute to the expense."² Where one party brings a suit, under such a statute, for the benefit of many having a common interest, but too numerous to be brought before the court, it is sufficient if they are described with as much certainty as the nature of the controversy will admit.³ To enable a member to bring a suit in his own right, and on behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the court, but the nature of their common interest must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right, or in their own names.⁴ In an action against an un-

¹Bromley v. Williams, 32 Beav. 177; 1 Daniell's Ch. Pr. 27; Pearce v. Piper, 17 Ves. 1; Cockburn v. Thompson, 16 Ves. 321; Story's Eq. Pleading, §§ 75, 107; Phipps v. Jones, 20 Pa. St. 230; Maguire's Estate, 7 W. N. C. 214.

²Dennis v. Kennedy, 19 Barb. 517; Stadler v. District Grand Lodge, 3 Am. L. Rec. 589.

³Sourse v. Marshall, 23 Ind. 194.

⁴Habicht v. Pemberton, 4 Sandford's Repts. (N. Y.) 657.

incorporated society, except when the statute permits it to be sued in the name adopted by it, the members are the proper parties; but where the trustees only are sued, if they are members, the defect is one of parties only, is waived if not objected to, and the trustees will, after judgment, be presumed to have been members.¹

In the absence of statutory regulation permitting an unincorporated society to sue or to be sued in the name by which it is commonly designated, the members must sue or be sued as partners or persons jointly interested. The court will not permit them to sue or to be sued in the character of a society, nor will courts of equity lend their aid to petitioners coming before them in such a character. It is the exclusive prerogative of government to create corporations, and to invest them with power to sue, as such, by their corporate name; and upon principles of policy the courts of the country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters.² In *Lloyd v. Loaring*,³ Lloyd and two other persons, "on behalf of themselves and all other members of the Caledonian Lodge of Free Masons, except the defendant, Loaring," brought their bill to obtain certain chattels belonging to the lodge. On demurrer to the bill for want of parties, Lord Eldon declined to hear argument in support of the demurrer, and, in allowing it, in the course of his opinion, said: "How is this court to take notice of these persons as a society? A bill might be filed for a chattel, the plaintiffs stating themselves to be jointly interested with several other persons, but it would be very dangerous to take notice of them as a society, having anything of constitution in it. * * It is the absolute duty of courts of justice not to permit persons not incorporated to affect to treat themselves as incorporated on the record. * * I desire my ground to be understood distinctly. I do not think the court ought to permit persons who can only sue as partners, to sue in a corporate character, and that is the effect of this bill."⁴

Where a suit in chancery was brought in the names of

¹ *Mattoon v. Wentworth*, 4 Cin. L. Bull. 513.

² *Story's Eq. Pl.* § 497.

³ 6 Vesey, Jr., 773.

⁴ See *Cullen v. The Duke of Queens-*

bury, 1 Brown's Chancery Cases 101; *Pearce v. Piper*, 17 Vesey 1; *Cockburn v. Thompson*, 16 Vesey 321;

Beaumont v. Meredith, 2 Ves. &

Beames 180.

"Jonah Pipe and William H. Humphreys, who sue in behalf of themselves, and many other persons too numerous to bring before the court, constituting the members of the British Emigrant Mutual Aid Society," it was held that the petitioners were not entitled to relief in the character in which they sued, that a mere voluntary society, without franchises, could not sue in the character of a society possessing corporate rights, and that the bill must be dismissed for want of proper parties.¹ Where a written promise to pay money is made to "the treasurer of" an unincorporated society, no action may be maintained by the treasurer against the promisor. To maintain that the treasurer has a right to an action in such a case would be to put him upon the same ground which he would occupy if the society had been incorporated and made capable by its charter of suing in the name of whoever might be its treasurer, on instruments made payable to the treasurer. Such a capacity to maintain an action can be conferred by a charter only. In such a case the members of the society are the proper parties to bring suit.²

§ 89. **As to actions by a society or a member for recovery of its property.**—A member of an unincorporated society can not maintain, in his name, for the benefit of the society, an action on a note given to or held by the society, without showing by his complaint or declaration that he is the general agent of the society, or that he is specially authorized to bring the suit for, and on behalf of the society, and without further showing that, under the contract and agreement by which the members are formed into and united as a society, the members themselves have a legal title to maintain the suit. The right to maintain the action must be shown to be in both the members at large and the member suing. Although the complaint or declaration avers that the society is unincorporated, it by no means follows that its individual members have a right to maintain an action in their own names, and for their own benefit, upon every security given to the society, or to third persons for account of it. Their right to do so must depend upon the nature of the association, and the terms and conditions of

¹ Pipe v. Bateman, 1 Iowa, 369; 82; Piggott v. Thompson, 3 Bos. & Chambers v. Calhoun, 18 Pa. St. 13. Pull. Repts. 146.

² Ewing v. Medlock, 5 Porter (Ala.)

the agreement by which its members are united. Although the society is not incorporated, its members are not necessarily either partners or joint owners. They may have only an equitable, and that only an eventual and contingent interest in the property and funds of the society, and to permit them to appropriate these to their own immediate use, by a recovery in their own names, or by one on behalf of the others, might be to aid them in deceiving the public, and defrauding creditors. These observations show not only the propriety but the necessity of requiring that the contract or agreement by which the members are formed into and united as a society shall be set forth, as the only means of enabling the court to determine whether they have a legal right to maintain the suit; and whether a member suing on behalf of the society has such an authority as will enable him to bring suit in his own name for its property is a question of law, which can only be determined when the whole nature and terms of his authority shall be set forth.¹

An unincorporated society, organized for purely benevolent and social purposes, carrying on no business, provided in its constitution and by-laws that its funds should be solely under the control of its members in good standing. All the members in good standing joined in an assignment to plaintiff of all their right to, and interest in, its funds, and authorized him to bring suit against defendants, who had appropriated them to their own use. It appeared that at the time of the assignment there were many members in arrears, and not in good standing, who had originally contributed to the fund, and who could, under the rules, resume their rights as members by paying arrearages. In a suit by the plaintiff against the defendants to recover the funds, it was held that plaintiff was clothed with a good title and had a right to sue under such an assignment and authorization, that the contributing members who were not in good standing had no legal interest in the funds, but only an interest contingent on paying arrearages, and that the organization was not a copartnership, the rights of whose members could be settled only in equity, and that a verdict for plaintiff was warranted.² The revocation by a su-

¹ *Habicht v. Pemberton*, *supra*. 41 N. W. Rep. 921; see *Kuhl v.*

² *Brown v. Stoerkel*, 74 Mich. 269; *Meyer*, 35 Mo. App. 206.

preme lodge or council of the social charter of a local lodge does not deprive the local lodge of the right to sue for and collect debts due it, since such right springs from the laws of the state and not from the rules and regulations of the society.¹ Trustees *de facto* of a society, whether incorporated or not, may maintain an action against a trespasser for an injury to the property of the society.² If, under the agreement of association, the trustees of an unincorporated society have power to collect money from its members, they may sue to recover the money if it is not paid.³

§ 90. **Right of an unincorporated society to the exclusive use of its name.**—The dissatisfied members of an unincorporated voluntary society can not, by incorporating themselves, deprive the unincorporated society of the right to use its own name; and a temporary injunction for that purpose will not be granted.⁴ An action will lie on behalf of an unincorporated society to enjoin a part of its members from procuring the incorporation of a society under the name used by it.⁵

§ 91. **Injunction restraining libel on society.**—An injunction will be granted upon an interlocutory application to restrain the publication of matter tending to injure a friendly society. An honorary member of a friendly society, having for its object the assurance of sums of money to defray the expenses of the funeral of deceased members, issued a circular among the clergymen of the parishes in which the society had district lodges, stating in the circular matters which were false at the time of framing and issuing the circular, and were calculated to injure the business interests of the society. Upon motion in an action by the trustees of the society against the honorary member, an injunction was granted restraining the issue of the circular until the trial of the action.⁶

§ 92. **Judgment against an unincorporated society.**—Where a society is proceeded against by *mandamus* or kin-

¹ Wells v. Monihan, 129 N. Y. 161; ⁴ Black Rabbit Association v. Monday, 21 Abb. New Cases (N. Y.) 99; 29 N. East. Rep. 232, affirming 13 N. Y. Supp. 156; see Wicks v. Monihan, 130 N. Y. 232; 29 N. East. Rep. 139; § 12. affirming 8 N. Y. Supp. 121.

² Green v. Cody, 9 Wend. 414.

³ Humphreys v. Company, 10 N. Y. Supp. 461.

⁵ McGlynn v. Post, 21 Abb. New Cases 97.

⁶ Hill v. Hart-Davis, 47 L. T. R. (N. S.) 82.

dred action, by a name not inappropriate as a corporate designation, and the application is resisted by it in that name and no denial of its corporate character is contained in the papers, it will be presumed that it is in fact a corporation.¹ But if the society is in fact an unincorporated society, in the absence of statutory regulation, a judgment against it will be null and void. Such a judgment is not a recovery against any person, either natural or artificial. The sale on execution on such a judgment of property held in the name of the society would be a nullity. Where suit is brought against a member of an unincorporated society, he may not plead a former recovery in an action against the society, under the name by which it is commonly designated. The society, having no legal existence, could not represent its members in a suit against it, and, as the member was not a party to the proceeding, such a plea would constitute no defense.²

¹ Doyle v. Benevolent Society, 3 34 Ill. 459; Stoddard v. Onondago Hun (N. Y.) 361; Barbaro v. Occidental Conference, 12 Barb. (N. Y.) 570. tal Grove, 4 Mo. App. 429; United ² Ash v. Guie, 97 Pa. St. 493. States Express Company v. Bedbury,

CHAPTER VII.

OFFICERS.

- § 93, 94. Election of officers.
- 95, 96, 97, 98. Powers and duties.
- 99. Salaries, fees, commissions.
- 100. Liabilities of officers.
- 101. Official bonds, rights and liabilities of sureties.
- 102. Liability of new sureties.
- 103. Liability on a bond to a state.

§ 93. **Election of officers.**—Power to elect officers and to conduct business through their agency pertains to an incorporated society, and need not be expressly conferred upon it. This power is, generally speaking, in the society at large, but may be lodged in its board of directors. Where the charter of a society authorizes the election of its “directors or managers at such time and place, in such manner, as may be specified in its by-laws,” a by-law authorizing its members to vote at all elections either in person or by proxy, is valid. Unless custom had ruled it otherwise, a member of a society could not vote by proxy by the civil law. It was so held because of the mischief and inconvenience which might arise from having a few members manage the affairs of the society.¹ The common law required all votes to be given in person, and when that is a part of the law of the land, and there is no statute authorizing votes to be cast by proxy, the society may not make provisions for voting by proxy.² But it has been held that provisions of the by-laws of an incorporated society for voting by proxy are matters of internal regulation and convenience, with which courts will not interfere, even though that mode of voting is not sanctioned by any statutory provision.³ Where at an election of directors of an incorporated

¹ Aycliffe, Civil Law, 202.

42; Commonwealth v. Bingham, 42;

² Taylor v. Griswold, 2 Green (N. 103 Pa. St. 134; 49 Am. Rep. 119. J.) 222; Craig v. Church, 88 Pa. St.

³ State v. Tudor, 5 Day 329.

mutual benefit society, the only objection made was as to the right of members to vote by proxy, it was held, on *quo warranto* proceedings against the directors elected, in the absence of proof that the persons executing the proxies were members of the society, or that the proxies were properly executed, that it would be presumed that the proxies were regular and proper.¹ A statute provided that the affairs of mutual benefit societies should be managed by not less than five directors elected from and by the members. The manager and secretary of a society were at first appointed by its trustees, but afterward a resolution was adopted providing for their election annually by the members. Blank applications for memberships had printed on them blank proxies, authorizing the person whose name should be inserted to act and vote for the member at all meetings, and underneath such blank proxies was a request to the applicant to sign it in blank to be filled up by the secretary. In accordance with this request, a great number of such proxies were so signed and sent to the secretary. The resolution above mentioned was adopted mainly by the use of such proxies. From the time this resolution was adopted the board of trustees practically ceased to control the affairs of the society. The governing authority was in the manager and secretary, who held a sufficient number of these proxies to perpetuate themselves in office, and who conducted its business as they saw fit. This was held to be a violation of law, and a fraud on the members.² When all the voters at an election held by a society were members in good standing, entitled to vote, the fact that the polls were kept open after the time prescribed by the constitution and by-laws, will not avoid the election.³ An election of a treasurer of a voluntary association by the board of directors, on whom that power is conferred by the constitution and by-laws, is void, where notice of the meeting was not given to all the directors, and

¹ *People v. Crossley*, 69 Ill. 195.

² *Chicago Mutual v. Hunt*, 127 Ill. 257; 20 N. East. Rep. 55.

³ *Rudolph v. Southern Beneficial League*, 7 N. Y. Supp. 135; *People v. Hosmer*, 2 How. Pr. (N. S.) 472; *People v. Railroad Co.*, 7 Abb. Pr. (N. S.) 265; *In re Railroad Co.*, 19 Wend.

135. Concerning the election of officers, see *People v. Railroad Co.*, 55 Barb. (N. Y.) 344; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Johnston v. Jones*, 23 N. J. Eq. 216; 1 *Waterman on Corp.* § 58; *State v. Bonnell*, 35 Oh. St. 10.

the terms of office of some of those participating in the election had not commenced; and the old treasurer is entitled to retain the books, papers, and moneys of the association, as against the person so elected.¹

§ 94. On the trial of a *quo warranto* proceeding in which the issue is on the legality of the election, evidence may be given of conversations and transactions, threats and confederacies of members previous to the election, if they were connected with, and might have had an influence on it.² Where the charter gave to the society power "to make rules, by-laws and ordinances, and to do everything needful for the good government and support" of the society, it was held that the society had power to make a by-law vesting the appointment of inspectors of their elections in the president of the society, and to make a by-law prohibiting tickets from being counted at an election, which had other things on besides the names. And it is a violation of such a by-law as last above mentioned, to have an eagle engraved on such tickets.³ When the mode of electing officers is not regulated by the charter, a corporation may make by-laws to regulate the election.⁴ Where an office in a society is not created or expressly authorized by state law, but is one created by an unincorporated society, and filled by election by a body which possesses no corporate powers or functions, the courts of the state have no authority whatever over the office, or over the election to it. These are controlled exclusively by such society, and the decisions of the society upon the legality or the result of such elections are final. Such an office can not be made the subject of *quo warranto* proceedings.⁵

Where two elections for trustees of a religious incorporated society were held on the same day, one held before persons designated in the manner customary with the congregation, and held at the usual place, and the other at another place, the persons having a majority of votes at the election conducted at the usual place, and in the usual manner, are to be considered as duly elected over others voted for at a

¹ Grand Rapids Guard v. Bulkley, 97 Mich. 610; 57 N. W. Rep. 188.

² Commonwealth v. Woelper, *supra*.

³ Commonwealth v. Woelper, 3 Ser. & R. (Pa.) 29.

⁴ Newling v. Francis, 3 T. R. 189.

⁵ Ter Vree v. Geerlings, 55 Mich. 562.

different place of election, though the persons holding the latter election were excluded from the usual place of election, and though the latter had a majority of all of the votes cast at both places of election.¹ Plaintiffs and defendants were originally members of the voluntary society known as "The Ancient Order of Hibernians," which consisted of national, state, and local bodies. Under its constitution, members of a local "division" were members of the national organization, and a withdrawal from the latter severed the connection of a member with the former, also. Any member could withdraw by paying his dues and giving written or verbal notice of his intention to do so. A schism arose in the order, and a new organization of seceding members was formed, which repudiated connection with, or obedience to, the old society, both national and state. Defendants united with the new order, and plaintiffs, though a minority of the division, reorganized it, and elected officers in lieu of the seceding members, who comprised all the officers but one. The reorganized division was recognized by, and retained its relations with, the old national organization. The seceding officers no longer pretended to act as officers of the old division. It was held that as it was apparent the seceders no longer intended to act as officers, vacancies existed, and the remaining members had the power to fill them by elections, and the division was not dissolved.²

In every case of corporations created by statute, so far as the statute directs and provides, it must rule; but in cases pretermitted by the statute, there are numerous principles of common law which apply, and guide and sustain the corporation; and to ward off their application, it would be necessary for the legislature to use negative expressions, or such as would exclude those general rules of law. It is one of those general rules that if a corporation fails to elect officers on its corporate day or time, still the corporation does not cease; the old officers retain their powers, and may act until they are superseded by a new appointment. Such officers are subject to liability on their bonds as much after, as before the time for which they were elected expires, if they continue to act, and

¹ *Juker v. Commonwealth*, 20 Pa. . ² *McFadden v. Murphy*, 149 Mass. St. 484. 341; 21 N. East. Rep. 868.

no subsequent election has taken place.¹ The decision of a court of law upon a *quo warranto* or *mandamus* operates *in rem*, and may remove or oust any one from an office which he holds, but a court of equity has no jurisdiction to remove an officer from the possession of his office or to declare such office forfeited. But when a court of equity has jurisdiction in a suit it is competent to inquire into and decide the question of the right to an office, or of the regularity of an election when that question arises incidentally.²

§ 95. **Powers and duties.**—In the absence of express provisions in the charter of a mutual benefit society, limiting the appointment of its officers and agents or the scope of their powers and duties, it must be presumed that each person, in becoming a member of the society, impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents. While it is not competent for the officers and agents to relieve a member from the payment of any assessment properly made on him, it is competent for them to mitigate the terms upon which his contract would otherwise become forfeited. In regard to regular insurance companies, it is well settled that agents may, by acts binding on the company, waive the causes of forfeiture declared in the policy, and there is no reason why the principle may not also apply to mutual benefit societies, where the waiver does not substantially impair the rights of the other members.³ It will be presumed that the officers of a mutual benefit society have such powers as are generally exercised by officers of other corporations. Persons acting publicly as officers of a society are presumed to be rightfully in office. If officers of an incorporated society openly exercise a power which pre-supposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the delegated authority for their acts will be presumed. The president, sec-

¹ Weir v. Bush, 4 Littell (Ky.) 430; ³ Protection Life v. Foote, 79 Ill. People v. Runkel, 9 Johnson Rep. 147. 361.

² Johnson v. Jones, 23 N. J. Eq. 216; Doremus v. Church, 2 Green's Ch. 332.

retary or other general officer of a society, when in the discharge of the duties of his office, represents the society itself, and has power, *prima facie*, to do any act which the directors could authorize or ratify.¹ He may waive the prompt payment of an assessment, and the valid exercise of such a power does not depend upon the particular place where he may be at the time. The true test of his authority to bind the society is not whether he acts in its general office, or in another state from that in which the general office is situated, but whether at the time he is engaged in the discharge of the general duties of his office and in the business of the corporation.² He may by his acts, after knowledge of an existing cause of forfeiture, waive the forfeiture, and estop the society to take advantage of it.³ His promise, made in the discharge of his general duties, is binding on the society.⁴ He may waive the prompt payment of assessments.⁵

The statement of the secretary of a mutual benefit society to a member, that he need not pay his dues until certain charges pending against him were disposed of, is binding on the society.⁶ Notice from the secretary of a society, whose duty it is to send it, is notice from the society, and it is bound by his acts.⁷

The application of a deceased member of a society was witnessed by a special instituting officer, who was present at the institution of the subordinate council to which the deceased belonged, and performed the duties of the secretary of such subordinate council, as a secretary had not been elected. The

¹ Leslie v. Lorillard, 110 N. Y. 519; Supp. 935; Kenyon v. Association, 122 18 N. East. Rep. 363; Holmes v. Wil- N. Y. 247; 25 N. East. Rep. 299; Me- lard, 125 N. Y. 75; 25 N. East. Rep. Corkle v. Association, 71 Texas 149; 1083; Rathbun v. Snow, 123 N. Y. 343; 8 S. W. Rep. 516; Van Houton v. Pine, 25 N. East. Rep. 379; Hastings v. Ins. 9 Stew. Eq. 133; 38 N. J. Eq. 72. Co., 138 N. Y. 473; 34 N. East. Rep. 289; ⁵ National Mutual v. Jones, 84 Ky. Mor. Priv. Corp., §§ 251-253. 110; 2 S. W. Rep. 447; Loughridge v.

² Hastings v. Ins. Co., *supra*. Association, 84 Iowa 141; 50 N. W.

³ Lindsey v. Society, 84 Iowa 734; Rep. 568; Mallory v. Insurance Co., 50 N. W. Rep. 29; Grand Lodge v. 90 Mich. 112; 51 N. W. Rep. 188. Brand, 29 Neb. 644; 46 N. W. Rep. ⁶ Jones v. Association, 84 Ky. 110; 95; Morrison v. Odd Fellows, 59 Wis. 2 S. W. Rep. 447; True v. Association. 162; Warnebold v. Grand Lodge, 83 78 Wis. 287; 47 N. W. Rep. 520.

Iowa 23; 48 N. W. Rep. 1069. ⁷ Olmstead v. Farmers' Mutual, 50

⁴ Keeler v. Association, 20 N. Y. Mich. 200.

instituting officer was charged with no duty respecting the application, except to see that it was in proper form when it was passed to the supreme council, of which he was, however, no officer. The grand council, of which he was an officer, had nothing to do with the benefit fund, nor was he by law charged with the duty of instituting councils, or receiving applications for membership. It was no part of his duty to pass on the qualifications of beneficiaries, and there was no officer on whom such duty did devolve. This officer had heard that the beneficiary was not a niece of the member, as set forth in the application, but testified that he had no personal knowledge on the subject, and did not recollect paying any attention to the statement in the application to the effect that she was his niece. The society was not, under these circumstances, estopped from showing that the beneficiary was not a niece of the deceased.¹ When the trustees of a secret society are vested with general power to manage its property, a lease of the lodge room to another society for use on one night in each week is not beyond their power, and is valid.²

§ 96. Where the organic law of a society or the charter procured from the state under that law, prescribes what classes of persons may become beneficiaries of its insurance, it is not in the power of an officer of the society to enlarge or restrict these classes.³ No restriction contained in the charter may be waived by an officer.⁴

§ 97. Mutual benefit societies and stock companies are essentially different in their plans of carrying on the business of life insurance. Societies have many by-laws which are a part of the contract of insurance, and which are binding on all members, whether officers or not. They are conducted on principle of mutuality, and should give insurance to each member on the same terms, conditions and restrictions. It would be destructive of this equality in the contracts of insur-

¹ Supreme Council v. Green, 71 Md. Mutual v. Rolfe, 76 Mich. 146; Hy-singer v. Supreme Lodge, 42 Mo. 263; 17 Atl. Rep. 1048.

² Phillips v. Aurora Lodge, 87 Ind. App. 627.
505.

⁴ Luthe v. Ins. Co., 55 Wis. 543;

³ Kentucky Masonic v. Miller's Belleville Mutual v. Van Winkle, 1 Adm'r, 13 Bush (Ky.) 489; Rindge Beasley (N. J.) 333.
v. Ins. Co., 146 Mass. 286; Michigan

ance to give to an officer the power to waive the provisions of a by-law which relates to the substance of the contract. As a general rule, an officer of a mutual benefit society has no authority to waive a strict compliance with the by-laws on the part of a member. The society has power to establish by-laws, and it is the imperative duty of the member to comply with them. Where the laws of a society provided that its by-laws should in no case be altered, unless previous notice of such intended alteration was given as prescribed, and it should be voted for by two-thirds of all the members present at that meeting, it was held that the president had no right in any case to suspend or change the by-laws by his verbal act, and at his pleasure, and that a member was chargeable with notice that he had no such right.¹ An officer of a mutual benefit society has no authority, as a general rule, to waive a strict compliance, on the part of a member, with its by-laws. This rule, however, does not extend to those by-laws which relate to the clerical transaction of its business, or to the mode of establishing its liability. By-laws in regard to proof of death of a member, for instance, may be waived. But it is well settled that the officers of such a society have no authority to waive those of its by-laws which relate to the substance of the contract between it and a member, determine the relations of the members to each other, or in any manner fix the rights and liabilities of the parties.² The by-laws of a society provided that no person should be eligible to membership who was under twenty-one, or over sixty years of age. For the purpose of procuring insurance as a member, a person represented that he was fifty-nine years old, when in fact he was sixty-four years of age. It was claimed after his death that the treasurer of the society had received assessments after he had knowledge of the decedent's true age. The court held that the evidence failed to show that the treasurer had acquired any knowledge or information of the false representation while in the discharge of any official duty, and said:

¹ *Hale v. Mechanics' Mutual*, 6 Gray; *Mulrey v. Ins. Co.*, 4 Allen 116; *Ev-169*; *Baxter v. Ins. Co.*, 1 Allen 294; *Ans v. Ins. Co.*, 9 Allen 329; *Harvey Hall v. Merrill*, 47 Minn. 260; see *v. Grand Lodge*, 50 Mo. App. 472; § 147. *Lyon v. Supreme Assembly*, 153

² *Burbank v. Association*, 144 Mass. 83; 26 N. East. Rep. 236; see 434; 11 N. East. Rep. 691; *Swett v. Grand Lodge v. Jesse*, 50 Ill. App. 101. *Society*, 78 Me. 541; 7 Atl. Rep. 394;

"But assuming that the treasurer acquired notice of the fact, when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member, and thereby make a contract of insurance, and if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any act of ratification."¹ Where a by-law provided that only persons between twenty and fifty-one years of age were eligible to membership, and the application of decedent stated that he was about forty-nine years old, when he was in fact over fifty-one years of age, it was held that even though the officers of the society knew his age and attempted to waive the by-law, they could not do so.²

A mutual fire insurance company issued a policy to its treasurer on a house owned by him. The policy contained several conditions, but not all of the by-laws of the society. The treasurer afterward sold the house and lot to the complainant, and assigned the policy to him. The complainant, during the negotiations, in the presence and hearing of the secretary, asked the treasurer whether the policy contained all the conditions of insurance. He replied that it did, and the secretary remained silent. After the house had burned, complainant brought an action at law on the policy, to which the society pleaded a by-law not mentioned in it. He had violated this by-law, and thereby forfeited all right of recovery. It was held upon these facts that as the officers of a society could not waive its by-laws, it was not estopped by the treasurer's statement to complainant, or by the secretary's silence, when the statement was made.³ But in one case it was held that where the by-laws provide that no one over the age of fifty years may become a member of the society, this qualification may be waived by the society.⁴

Neither the majority of the members, nor the board of

¹ *Swett v. Society*, 78 Me. 541; 7 Atl. Rep. 364.

² *McCoy v. Ins. Co.*, 152 Mass. 272; 25 N. East. Rep. 289.

³ *Miller v. Association*, 42 N. J. Eq. 457; 7 Atl. Rep. 895.

⁴ *Morrison v. Odd Fellows*, 59 Wis. 162; 18 N. W. Rep. 13; *contra*, *McCoy v. Ins. Co.*, 152 Mass. 272; 25 N. East. Rep. 289. But where the agent

and the insured, knowing the restriction, conspired to falsely represent that the applicant was under that age, the society is not bound by the acts of the agent, and there is no waiver of the by-law. *Hanf. v. Association*, 76 Wis. 450; 45 N. W. Rep. 315; see *Supreme Council v. Boyle*, (Ind. App.); 37 N. East. Rep. 1105.

directors have a right to disregard a by-law which has been properly passed. It must be lived up to until repealed or amended.

In one case the by-laws restricted membership to persons between certain ages. Applicant was ineligible but misstated his age, and the secretary knew of the misstatement. The by-laws also provided that "in case a certificate of membership has been issued upon an application fraudulent or false in any statement therein, the secretary shall cancel the certificate and return the money." Instead of acting under this by-law, the secretary continued to make assessments on the member, and the court held that the course pursued was an effectual waiver of the restriction as to age.¹

An officer may not waive prepayment of the membership fee or an assessment, and declare the contract binding, where the by-laws require prepayment before the contract shall become effective.² Where the by-laws make it the imperative duty of officers to literally and rigorously enforce forfeitures for non-payment of assessments on the day fixed, the members are each bound by such provisions.

Where the constitution of a supreme body sets forth the only method of re-instating a member after he has been suspended, the officers of a subordinate lodge may not waive these requirements.³

§ 98. The failure of the officers of a mutual benefit association to keep correct, and intelligible books of accounts, whether such failure results from design, carelessness, or want of skill, is a serious breach of official duty. Such officers are trustees, having funds intrusted to their care, to be safely and honestly kept and administered, not for their own benefit, but solely for the promotion of the laudable objects for which the association is organized. It is a duty of primary importance, incumbent on all trustees, to keep proper accounts of trust funds; for unless that is done the beneficial owners of such funds are subjected to constant uncertainty as to their rights, and to a

¹ *Morrison v. Odd Fellows*, 59 Wis. 162. In this case the court expressly states that the secretary had the power to waive the restriction as to age. See *Supreme Council v. Boyle*, Ind. App.; 37 N. East. Rep. 1105. ² *Brewer v. Ins. Co.*, 14 Gray (Mass.) 203. ³ *Grand Lodge v. Jesse*, 50 Ill. App. 101.

constant liability to be defrauded. Next to the duty of honestly administering a trust fund is that of keeping a true, honest, and intelligible account of such administration.¹ It was held that the officers of a society were guilty of fraud upon the members in issuing certificates of membership numbered higher than the total number of certificates issued up to that date; and it was no excuse that such false numbering was done, not to deceive new members, but merely to prevent rival associations from ascertaining the state of the business. No attempt having been made to apprise applicants of the truth, the effect was fraudulent.² Where an officer of a society renders a false statement of its affairs to an officer of the state, to whom he is required by law to make a report, or where he suppresses facts which ought to have been stated in such a report, he is guilty of fraud and should be removed.³

§ 99. **Salary, fees, commissions.**—Where there is no agreement between the society and one of its officers, that he is to receive any salary for his services, the right to such compensation must depend upon the usage in like cases. Where an officer has not only made no charge against the society from time to time, as he has made reports to it of his stewardship, but has, as shown by the minutes of the proceedings, received the thanks of the society for his gratuitous and able management of the affairs under his control as such officer, it must be held that he may not charge the society for such services.⁴ Trustees of a society, having voted to themselves and accepted designated sums of money as compensation for their services for particular years, have no power, in subsequent years of their service, to vote themselves "back pay" for their services during such former years. Such trustees have no authority, by virtue simply of their trusteeship, to act for or bind their society, except in their aggregate and administrative capacity as a board; and where they assume, by virtue of their trusteeship, to act in the separate and individual capacity of treasurer, secretary, or as general or special agent of their association, they can not thereby create against it a legal liability to compensate them as trustees for such services. Such trustees,

¹ *Chicago Mutual v. Hunt*, 127 Ill. 257; 20 N. East. Rep. 55.

² *Chicago Mutual v. Hunt*, *supra*.

⁴ *Vestry and Wardens v. Barksdale*,

² *Chicago Mutual v. Hunt*, *supra*. 1 Strob. Eq. (S. Car.) 197.

unless specially invested with the additional capacity and authority of officers or agents, are limited in their claims for compensation to such sums as will reasonably compensate them for the time and expense incurred in going to, attending, and returning from their official meetings, and for their services while in session.¹ Trustees are charged with the duty of faithfully executing the trust which the laws and regulations impose on them. They are entitled to a reasonable compensation for the service rendered; but any plan or scheme by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of executing the trust, is a breach of trust.² Where officers and directors of a mutual benefit society, engaged in the business of issuing wagering policies, have divided among themselves the surplus funds of the society as compensation for their own services, a decree may be entered against the officers and directors jointly, in favor of a receiver appointed on dissolution of the company, for the amount of the funds fraudulently misappropriated.³

The salaries of officers of voluntary societies must not, especially when the officers fix the amount of their own salaries, be out of proportion to the amount of responsibility and labor devolving upon them. And where it is shown that the officers of the society seem to regulate their salaries rather by the condition of its expense fund than by the compensation actually earned, courts will, upon application, interfere to protect the interests of the members.⁴ A corporation can not avail itself of a mutual agreement made by its officers among themselves to accept a reduced rate of salary for their services to be thereafter performed, the corporation not having been a party to the agreement, and the same not having been communicated to or accepted by it or its directors.⁵ An officer of a corporation, in order to recover compensation for his services,

¹ State v. Association, 42 Ohio St. 597; Robinson v. Supreme Council, Baltimore Daily Record, May 17, 1892.

² State v. Association, 38 Oh. St. 281. ⁵ Richard Thompson Co. v. Brook, 14 N. Y. Supp. 370; Robinson v. Supreme Council, Baltimore Daily Record, May 17, 1892.

³ McCarthy's Appeal, 17 W. N. C. 182.

⁴ State v. Association, 42 Oh. St.

must show that he is an officer *de jure* as well as *de facto*. It is the legal right to an office which confers the right to receive and appropriate the salary, fees, and emoluments incident to such office; and if an officer *de facto* has obtained such salary, fees, or emoluments, he is liable to the officer *de jure* in an action for money had and received.¹ If suit be brought by a person claiming to be an officer for the salary or compensation belonging to such office, his title to the office is in issue, and, if that be defective, and another has the real right, although not in possession, the plaintiff can not recover.²

§ 100. **Liability of officers of mutual benefit society.**—It is the duty of the officers of a mutual benefit society to protect and properly disburse the funds which have been collected by assessments for the payment of death losses, and if the directors have divided among themselves and other incorporators, and paid out for expenses, any money which ought to have been applied to the payment of a death loss, they are personally liable to the beneficiary for the amount misappropriated or misapplied, even though they acted in good faith in the matter.³ But officers of such a society, whose duties are executive, and who are subject to the direction and control of the directors, are not liable for such misappropriation of funds, if they have simply performed their duties as directed. The officers of such a society are not liable for money of the society deposited in bank, and lost by its failure, if they acted, in reference to such deposit, in good faith, and as prudent men generally acted in the same community.⁴ The treasurer of a society in a proceeding for an accounting, should not be allowed a set-off for expenses incurred by him in carrying out an illegal vote to dissolve the society, nor for costs and expenses of an equity suit brought by members to restrain him from carrying into effect the illegal vote.⁵ Where the laws of an association provide that the funds shall be placed

¹ Mayfield v. Moore, 53 Ill. 428.

Iowa 698; 10 N. W. Rep. 248; Com-

² Waterman v. Company, 139 Ill. 658; 29 N. East. Rep. 689; Dolan v. Mayor, 68 N. Y. 274; Matthews v. Supervisors, 53 Miss. 715; Dorsey v. Smyth, 28 Cal. 21; Andrews v. Portland, 79 Me. 484; 10 Atl. Rep. 458; McCue v. County of Wapello, 56

Stock v. Grand Rapids, 40 Mich. 397.

³ Stewart v. Association, 64 Miss. 499; 1 So. Rep. 743.

⁴ Stewart v. Association, *supra*.

⁵ St. Mary's Ben. Ass'n v. Lynch, 64 N. H. 213; 9 Atl. Rep. 98; 4 N.

Eng. Rep. 163.

in the hands of the treasurer, and that no money shall be drawn except by an order of the executive council, signed by a chief officer (naming him) and at least two trustees, without providing any manner of turning over funds to a successor, an action to recover the funds can not be maintained against the treasurer merely because he refuses to pay the money in accordance with a resolution of the executive council, when no order is drawn and signed as provided.¹ Trustees or officers of an unincorporated society are not individually liable for its debts, unless they have in some way specially rendered themselves liable.² The funds of a society were kept on deposit in bank, subject to the order of the trustees. One of the by-laws of the society provided that the trustees should "keep the funds invested, for the best interests of this tribe, in such stocks, bonds, mortgages, or other securities as shall be approved by two-thirds of the members thereof present at a regular council." An order was passed by the tribe or society, instructing the trustees "to try and invest the money in the bank, not exceeding \$2,000." Such an order does not purport to authorize an investment of money of the tribe otherwise than "in stocks, bonds, mortgages, or other securities, approved by two-thirds of the members thereof present at a regular council," and an investment of any of such funds by the trustees in real estate bought of a member of such tribe or society, is voidable at the election of the society. In an action against the trustees and the vendor to have such a purchase declared void, evidence that one of the trustees understood that the propriety of the purchase was first to be submitted to the society, is admissible; and evidence that one of the trustees acted without the concurrence of a co-trustee, or that the latter was induced to concur in his act by reason of misrepresentations which he had made with respect to the concurrence of a third trustee, is also admissible. In such an action the question whether the acts of the officer were fair or unfair is to be determined by the jury, and not by the trustees who may be called as witnesses. Where a mortgage made by the vendor has been paid off and canceled with funds derived from a fraudulent sale of property to the society, and suit is

¹ *Smith v. Pinney*, 86 Mich. 484; 49 N. W. Rep. 305. ² *Wolf v. Schlieffer*, 2 Brews. 563.

brought to set aside such sale, the vendor and mortgagee being parties, the mortgage may be revived and enforced for the benefit of the society against all the property therein described, to the extent of the amount applied by the vendor to its satisfaction, from the proceeds of such fraudulent sale.¹ A member of a society, who is elected its treasurer to receive and invest the funds of the society in his individual name, and who does so invest them, holds the funds as a trustee for the society, and is subject, as such trustee, to the jurisdiction of a court of equity.² Neither the society nor its officers can appropriate its funds to other purposes than those for which they were intended, and a court of equity will interfere to prevent a wrongful disposition of them.³ The fact that an unincorporated society, not a charity, is subject to the sole government and control of a superior body, does not deprive courts of their jurisdiction to compel certain trustees of the society, removable at its pleasure, to transfer the trust estate to new trustees duly chosen by it.⁴ A bill in equity stated that the plaintiffs and many others had formed a voluntary association for benevolent purposes, that the name of the association was afterward changed by vote of its members at a regular meeting, that the funds of the association were deposited for its use in the names of its four trustees in a savings bank, that one of its trustees had refused to join with his co-trustees in an assignment of those funds to their successors, and that the bank had refused to transfer the funds without such an assignment; it prayed that the savings bank might be ordered to transfer the funds, and that the trustee might be ordered to join in the assignment. The court held that plaintiffs and their associates might maintain the bill.⁵

Where the trustees of a lodge had executed their notes for its

¹ Red Jacket Tribe v. Gibson, 70 Cal. 128. Library v. Bliss, 151 Mass. 364; 25 N. East. Rep. 92; Peter v. Carter, 70

² Weld v. May, 9 Cush. (Mass.) 181. Md. 139; 16 Atl. Rep. 450; Trustees v.

³ Penfield v. Skinner, 11 Vt. 296; Adams, 65 N. H. 225; 18 Atl. Rep. Bailey v. Lewis, 3 Day (Conn.) 450; 777.

Stadler v. District Grand Lodge, 3 Am. L. Rec. 589; *In re Equitable* of Cases, 358.

Reserve, 16 N. Y. Supp. 80; Goodman v. Jedidjah Lodge, 67 Md. 117; Birmingham v. Gallagher, 112 Mass. 190; see Snow v. Wheeler, 113 9 Atl. Rep. 13; Thomas v. Ellmaker, Mass. 179.

1 Par. Sel. Cases (Pa.) 98; Cary

debts and afterward had in good faith made a sale of its property to a stranger, in consideration of his agreement to pay such notes, it was held that they might thereafter, as individuals, repurchase the property from such purchaser, and the mere fact that they did so, without any consideration other than their agreement to pay the notes assumed by the purchaser, did not render such sale fraudulent and void as to the creditors of the lodge.¹ Zealous as courts of equity are, in watching the conduct of a trustee in connection with the objects of his trust, he is only forbidden by them from dealing with the trust property for his own benefit, so long as the trust continues. The moment it ceases, he occupies precisely the same relation to it that strangers to the trust do, and, acting in good faith, he may become the owner by purchase or otherwise.²

§ 101. **Suits upon the bonds of officers—Rights and liabilities of sureties.**—Where persons become sureties upon the bond of a treasurer of a society, for the faithful application of money in his hands belonging to the society, the fact that the officers and members knew of his previous misappropriations of the funds intrusted to him during the prior year, and with such knowledge re-elected him, and failed to communicate such fact to his sureties, no inquiry having been made of them by the sureties, and they having done no act to put the sureties off their guard or to prevent them from ascertaining the facts, does not impute fraud on the part of the society, which can be set up in avoidance of the liability of such sureties on the bond. This rule is not changed by the fact that such society is a secret organization. The account books are not under the seal of secrecy. But, under any circumstances, if a person proposing to become surety for an officer of a lodge inquires of any other officer, or even of its members, they will, if within their knowledge, be required to communicate correct information. The sources of information are open to the proposed sureties if they are disposed to pursue them, but if the officers and members are asked nothing and say nothing, they are not guilty of fraud.³ If the principal in the bond was, at

¹ *Miller v. Lebanon Lodge*, 88 Ind. 286.

³ *Roper v. Sangamon Lodge*, 91 Ill. 518.

² *Munn v. Burgess*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160.

the close of his first term, a defaulter in his capacity as such officer as respected a material amount of the funds of the society, and if such fact was known to the president of the society before, and at the time of the delivery by the sureties of the bond, but was unknown to the sureties, or any of them, and the latter, before they would deliver the bond, made or caused to be made inquiries of said president, or in open lodge, in his presence and hearing, for information respecting the condition of the accounts or financial relation with the society of such officer, and if the fact of such defalcation was fraudulently concealed from them by the president, or other agent of the society, acting within the scope of his apparent authority, and having knowledge of such defalcation, or if they falsely represented to the sureties that his accounts were all right and correct, and thereby induced them to deliver the bond to the society, then it would be void, and no recovery could be had upon it.¹ It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. Fraud will be inferred in such a case, and it is not necessary to show in addition to the knowingly false representations, that they were made with the intention to deceive the sureties, and with the purpose of deceiving them and inducing them to deliver the bond.²

In an action against the sureties on the bond of an officer of a society it was held that admissions by the principal on the bond, although made subsequently to the acts to which they related, were properly admitted to charge the sureties, such admissions being against the interest of the principal, and he having since died; that a letter of the principal containing collateral matters, written in extenuation of his conduct in using certain money in his hands, was improperly admitted.³ F. was

¹ Drabek v. Grand Lodge, 24 Ill. App. 82; Wayne v. Commercial Nat. Bank, 52 Pa. St. 250; Franklin Bank v. Cooper, 36 Me. 180; 39 Me. 542; §§ 151, 152, and authorities cited in Sooy ads. the State, 39 N. J. L. 135.

² Drabek v. Grand Lodge, *supra*; Greenleaf on Ev. § 52. Case v. Ayers, 65 Ill. 142; Gough v. St. John, 16 Wend. 645; Railton v. Mathews, 10 Cl. and Fin. 934.

³ Drabek v. Grand Lodge, *supra*, citing as sustaining the first proposition 1 Greenleaf on Ev. (May's Ed.) notes, and as sustaining the second, 1

elected treasurer of a lodge of Knights of Pythias in 1879, and annually thereafter until 1885. Although the constitution of this order required that this officer should give bond with security before entering upon the duties of his office, F. was not required to give bond until April, 1884, when he executed the bond sued on. This bond covenanted that he would render an account for all money or other property which should come, or had already come to his hands, "or is now in his hands." At the time he executed the bond he owed the lodge from \$400 to \$500. He had placed the money in his business, but this fact was not known either to the lodge, or to his sureties. When his successor was elected in 1885, he owed the lodge \$880.17, and soon afterward paid \$500. An action was brought on the bond to recover the remainder. The court held that F. was at least a *de facto* officer prior to the time he executed the bond, and the sureties could not rely upon his failure to execute bond as a defense as to the money which came into his hands during that time; that the amount which F. owed to the lodge when the bond was executed was in legal contemplation, "in his hands" within the meaning of the bond, although the money was invested in his business, and that his sureties were liable therefor.¹

§ 102. **Liability of new sureties.**—That new sureties are not responsible for prior defalcations, unless the condition of the new obligation embraces them, is a principle which has frequently been decided by the courts.² It is a familiar principle that the obligation of a surety is a matter of strict law, and can never arise from implication. The bond must speak for itself, and its language can never be extended or altered to the injury of the surety. It would be a violation of this elementary principle to hold the sureties on the last bond liable for the defaults of the first as well as the second term.³ But a different rule prevails in Illinois, and it is there held that when an officer of a society is re-elected and becomes his own

¹ Wilson v. Wright, 8 Ky. Law Rep. 963 (Ky. Sup'r Ct).

² Ohning v. City of Evansville, 66 Ind. 59; Vivian v. Otis, 24 Wis. 518;

³ United States v. Boyd, 15 Peters 187; Myers v. U. S., 1 McLean 493; N. Y. 120. Bessinger v. Dickerson, 20 Iowa 260; Inhabitants, etc., v. Randall, 105 Mass. 295.

successor, and at the commencement of his second term reports a certain sum in his hands, and gives bond with sureties to account for and pay over the moneys coming to his hands during the term, his sureties when sued, will be responsible for the sum so reported in his hands, and will not be permitted to show that the defalcation, in fact occurred during the previous term, and throw the liability on his sureties for that term.¹

§ 103. **Liability on a bond to a state.**—The law of Kansas² provides: "The officers of each such association having custody of the papers or funds thereof shall enter into bonds to the state of Kansas for the benefit of the party interested, in the sum of fifty thousand dollars, with three or more sureties, to be approved by the superintendent of insurance, conditioned for the faithful accounting for, and proper payment and disbursement to the legitimate purposes of the association, of all the moneys thereof which come into their hands, and for the faithful performance of all contracts made with its certificate or policy holders." Of this statute the supreme court of that state said: "The legislature has seen fit to require a bond from these officers for a faithful performance of their duty under the law, and the contracts made with the members, instead of requiring a bond to be given by the association, and thus holding all the members liable for the defaults of those in office. Some doubt is thrown on the construction of the statute by providing in addition for the faithful performance of the contracts made with the certificate or policy holders; but as the bond is given by the officers, and the promise is made for them, the manifest meaning is that they were to faithfully perform the contracts of the association while they were intrusted with the control of its business,—that is, during their terms of office. At each annual meeting officers are chosen who are required to give a bond; and it would be an unreasonable interpretation which would require officers to be responsible for the derelictions or defaults of those who succeed them. Taking the provisions of the act together, the reasonable construction is that the officers will faithfully discharge their duties, and perform the contracts of the association, during the term for which they were elected."³

¹ Roper v. Sangamon Lodge, 91 Ill. 518.

³ Kaw Life Ass'n v. Lemke, 40 Kan. 142 and 661; 20 Pac. Rep. 512.

² Chapter 131, Laws 1885.

CHAPTER VIII.

MEETINGS.

- § 104. Notice of meetings.
- 105. Rules governing future meetings.
- 106. Duty of members present to vote.
- 107. Presumption that a quorum was present.
- 108. When corporate acts are binding.
- 109. Meetings on Sunday.

§ 104. **Notice of meetings.**—If the charter or by-laws of a society fix the time and place at which regular meetings shall be held, no further notice to the members is necessary. But where particular business of great importance and extraordinary character is to be brought before a regular meeting, notice of the meeting, and the particular matter to be brought before it should be given. In order to give validity to acts done at a special meeting, all the members must be notified.¹

A notice of a special meeting must always be given. It should be given to the member in person, unless it is otherwise provided in the charter or by-laws. A notice of a meeting should state specifically the time when, and the place where it will be held, and the particular business which will come before the meeting. Where the charter or by-laws do not prescribe how long before a meeting a notice shall be served, it must be served a reasonable time before it. A notice of a special meeting of a society, which does not state the business to be transacted, does not authorize a vote to dissolve the association and dispose of its property.² When a member of a society is present at a meeting, and participates in the proceedings he complains of, such proceedings not being improper in themselves, nor subversive of the object for

¹ Commonwealth v. Guardians, 6 C. 789; Kuhl v. Meyer, 42 Mo. App. Serg. & R. 469; Knyaston v. Mayor, 474.

² Strange 1051; Rex v. Liverpool, 2 ² St. Mary's Association v. Lynch, Burr. 734; Smyth v. Darley, 2 H. L. 64 N. H. 213; 9 Atl. Rep. 98.

which the society was formed, he is estopped to object to the irregularity of the meeting and the insufficiency of the notice of it.¹ Where the organic law, the charter, or the by-laws prescribe a form of notice, or the manner in which it shall be served, the notice must conform to these requirements. If it fails so to conform, the proceedings of a meeting held pursuant thereto, are invalid.² All members of a society are presumed to know of the times appointed by the charter, constitution or by-laws, for the transaction of particular business; and, therefore, no special notice is required to be given of such meeting, or of the intention to transact such business. A society can transact any business at an adjourned meeting, which could have been done at the original meeting, the former being but a continuation of the latter. No new notice of the adjourned meeting is necessary.³ But if, at a regular meeting, notice is given that a special meeting has been called, notice of such meeting should be sent to the members, for there is no presumption that persons not present at a regular meeting knew what was done there.⁴

It is a presumption of law, that every meeting of a society was lawfully and regularly held, and that the proper notice of it had been given. It is for him who attacks the legality and validity of a meeting, to prove want of notice, or its insufficiency.⁵ Where the time or manner of giving notice is prescribed, it is essential to the validity of the acts done at the meeting that notice was given as prescribed.⁶ Any member may object to the sufficiency of the notice and the validity of the acts done. But the prescribed notice may be dispensed with by unanimous consent, and where all the members appear and participate in the proceedings of the society without objection to the notice of the meeting, they waive any objection to it.⁷

§ 105. Rules governing future meetings of the society.—

¹ Fischer v. Raab, 57 How. Pr. 87; Porter v. Robinson, 30 Hun 209; Sargent v. Webster, 13 Metc. (Mass.) 497.

² Stevens v. Society, 12 Vt. 688.

⁶ Hunt v. School District, 14 Vt.

³ Warren v. Mower, 11 Vt. 385; 300; 39 Am. Dec. 255; Stow v. Wyse, Scadding v. Lorant, 5 Eng. L. & Eq. 7 Conn. 214; 18 Am. Dec. 99.

16; Smith v. Law, 21 N. Y. 296.

⁷ Judah v. Ins. Co., 4 Ind. 333;

⁴ People v. Batchelor, 22 N. Y. 128. Jones v. Milton, 7 Ind. 547.

⁵ Society v. Weatherly, 75 Ala. 248;

An enactment made by one meeting of the society to govern the proceedings of future meetings, is inoperative beyond the pleasure of the society, acting by a majority vote at any regular meeting. The power of the society to enact its laws is continuous, residing in all regular meetings of the society so long as it exists. Any meeting can, by a majority vote, modify or repeal the law of a previous meeting, and no meeting can bind a subsequent one by irrevocable acts or rules of procedure. The power to enact is the power to repeal. A by-law requiring a two-thirds vote of members present to alter or amend the laws of the society, may itself be altered, amended or repealed by the same power which enacts it.¹

§ 106. **It is the duty of members present to vote.**—When the proper presiding officer of a society puts a question to a vote, it is the duty of every member to respond, or be counted with the greater number, because he is supposed to have assented beforehand to the process pre-established to ascertain the general will. But the rule of implied assent is certainly inapplicable where the proceedings are revolutionary in their character, and the question is not put by the proper presiding officer. The refusal of an appeal from the decision of the presiding officer is no ground for his degradation at the call of a minority; nor could it impose on the majority an obligation to vote on the question when put unofficially, and out of the usual course. In such a case, the rule of implied assent does not apply, and such a vote of degradation can not be sustained by the constructive votes of those who remain silent.² All persons present at a meeting at which a vote is taken, disposing of a fund of the society, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto. Their right to the fund is concluded. But the rule is otherwise as to those not present.³

§ 107. **When a quorum is presumed to have been present.**—Where it is not usual to mention on the minutes the names or number of those present, and the charter requires

¹ Commonwealth v. Mayor, 5 Watts 152; Richardson v. Society, 58 N. H. 187; see § 28. ² Abels v. McKeen, 18 N. J. Eq. 462; Richardson v. Society, 58 N. H. 187.

³ Commonwealth v. Green, 4 Whart. (Pa.) 537-603.

two-thirds to form a quorum, it will be presumed that the required two-thirds assembled, where it is stated on the minutes that, on due invitation, the members met.¹

§ 108. **When corporate acts are binding.**—In aggregate societies, the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the members of the society; the majority of the definite body must be present, and then a majority of the quorum must decide; but a majority of the members of the society present may act.² When no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not. And, though a particular constitution require the presence of a majority of the whole number, yet the concurrence and consent of a majority of the whole is not necessary; it is sufficient that a majority of the number present concur. So, where a number less than the majority of the whole are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole.³ An incorporated society can only speak and act through the medium prescribed by law. When the law prescribes this medium to be the board of directors, the society at large may not assume the management and direction of its affairs. At a meeting of the members of an incorporated mutual benefit society, a resolution was passed directing a larger amount to be paid to certain beneficiaries than the amount of the respective assessments collected for their benefit. A by-law of the society provided that no money could be drawn or appropriated from the treasury without the order of the directors. The supreme court of California held that, in the absence of an adoption or ratification by the directors, the resolution was inoperative, as in that state an

¹ Commonwealth v. Woelper, 3 Ser. & R. 28.

² 2 Kent's Com. 293; see § 127.

³ 2 Bacon's Abridgment, 459.

incorporated society could only act by its board of directors.¹ A by-law adopted at a meeting at which a quorum is not present is invalid.² An amendment to the by-laws is binding upon members not present at the meeting at which it was adopted, only when it is affirmatively shown that the meeting was called in the manner provided by the constitution.³ Where the minutes of a society show that a motion was made to suspend a certain member, but do not show what action was taken on the motion, it is competent to prove by parol evidence that the motion was put and carried.⁴

§ 109. **Meetings on Sunday.**—A member was expelled from the society at a meeting held on Sunday evening, and the notice of the charges and meeting was also served on Sunday. He applied to be reinstated on the ground that the proceedings and notice were void. But the court held that, however objectionable it might be to hold business meetings of such a society on that day, it was not forbidden by the statutes of the state of New York, and, in the opinion, the court said: "The relator chose to belong to a society which held all its regular meetings on that day, and if, at such a meeting, he was served with a notice to attend the next meeting, it does not rest with him to make the objection. * * At the common law, judicial proceedings only were prohibited on Sunday. Hence, judicial proceedings on Sunday are void at common law. But all other business transactions are valid, except so far as prohibited by our statute."⁵ Speaking parenthetically of the fact disclosed by the record, that a member had been expelled on Sunday from a mutual benefit society consisting of Israelites only, the supreme court of Pennsylvania said: "It may not be amiss, with a view to call attention to it, to notice that this was not an ecclesiastical or church trial, concerning matters of conscience. It was an ordinary secular or business affair, being the same kind of trial which any other corporation might engage in. It might be well to consider how far such trials on Sunday

¹ *In re Association*, 68 Cal. 392.

⁴ *Hamill v. Supreme Council*, 152

² *Lockwood v. Bank*, 9 R. I. 308.

Pa. St. 537; 25 Atl. Rep. 645.

³ *Metropolitan Association v. Wind-*
over, 137 Ill. 417; 27 N. East. Rep. 538; 357.
see § 26.

⁵ *People v. Society*, 65 Barb. (N. Y.)

comport with the legislation of the state and the genius of our institutions. It will also be remembered that Jews, who regard the seventh day only as their Sabbath, are bound to observe the civil regulations made for the observance of the Christian Sabbath.”¹

¹ Society v. Commonwealth, 52 Pa. St. 125; citing Merritt v. Earle, 31 Barb. 38, 41.

CHAPTER IX.

JURISDICTION OF COURTS OVER SOCIETIES.—PART I.

- § 110. Visitorial power of courts.
- 111. Courts of society must first be resorted to.
- 112. Courts may not be ousted of jurisdiction.
- 113, 114. When courts will not take jurisdiction.
- 115. Injunction to restrain illegal act.
- 116. Injunction to restrain society from doing business on erroneous plan.
- 117. Status of unincorporated societies.
- 118. Dissolution of an unincorporated society.
- 119. Dissolution of an incorporated society.
- 120. When a society is dissolved by its own act or neglect.

§ 110. **Visitorial power of courts.**—The visitorial or superintending power of the state over incorporated societies created by the legislature will always be exercised in proper cases, through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end, the court will appoint receivers, and issue writs of *quo warranto*, *mandamus*, or injunction, as the exigencies of the particular case may require, will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations.¹ The doctrine, as laid down by the supreme court of Illinois, that the power of incorporated voluntary societies to enact by-laws is unlimited, and that courts will not interfere with the enforcement of any by-law thus enacted, is in conflict with the decisions and principles on this subject.² But over

¹ State *ex rel.* v. Chamber of Commerce, 47 Wis. 670.

² People v. Board of Trade, 80 Ill. 134.

unincorporated societies the state has no visitatorial or superintending control. They are not created by the state, but are brought into being by the contract of the members. Courts will interfere, on the application of an aggrieved member, to see that his property or civil rights are governed according to such contract, but will in no wise interfere with the terms of the contract, so long as they are not contrary to law.¹

§ 111. **Courts will not take jurisdiction until the remedies provided for in the society have been exhausted.**—It is the law of voluntary societies, whether incorporated or unincorporated, that they may, in all matters relating to their internal and governmental affairs, and concerning the relations and rights of members, as such, provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed methods of procedure, before invoking the power of the courts of the land. Men voluntarily enter such societies, and in becoming members, subscribe to their laws. It is, therefore, no hardship to require them, before seeking their remedy under the law, to exhaust their remedy under the contract of membership. The harmony and efficiency of such societies require that they be permitted, as far as possible, to carry out their purposes and objects in the manner and mode which shall be agreed upon by the members, and that the right to resort to the courts for the settlement of controversies and grievances be restricted. When the charter, constitution or by-laws of the society require a member to first seek redress within the society, and by appeal to carry the question to its highest tribunal, he has no right to bring an action against the society in a court of the land, until he has exhausted his remedy in its tribunals.² After a controversy has been submitted to a tribunal of a society, while it is still pending, and before the decision is announced, a court will refuse to entertain jurisdiction of it.³ There is no presumption that societies provide methods within themselves for redressing grievances, or set-

¹ § 22.

Harrington v. Association, 70 Ga.

² See §§ 47, 311; *Screwmen's Association v. Benson*, 76 Texas, 552; *Es-* 340; *Karcher v. Supreme Lodge*, 137
sery v. Court Pride, 2 Ontario Rep. Mass. 368.

596; *Poultney v. Bachman*, 31 Hun 534.
49; *Lafond v. Deems*, 81 N. Y. 508;

³ *Strempel v. Rubing*, 4 N. Y. Supp.

ting controversies, and in the absence of evidence showing the existence and terms of such provisions, the courts will assume that there are none.¹

Where the society makes provision for the settlement of controversies between it and its members, or between its members, concerning its government, its dissolution, or its property, courts will refuse to take cognizance of such controversies until those who have grievances have, in the first instance, resorted to and exhausted the remedies provided by the society; and it is not necessary, in such a case, that the language of such provisions shall make it imperative on the members to exhaust these remedies, but it is sufficient that the society has afforded a means for a settlement within the society itself. The mere provision of such a means abridges the right to appeal to the courts, until the prescribed means have been pursued. This rule also prevails in matters of discipline, in the expulsion and suspension of members, and arises from the fact that in such cases the controversy springs from the contract of membership, and is a matter of internal regulation. With such matters courts are loth to deal, and will take jurisdiction only when compelled to do so. But it has been held that where a member appears in the relation of a creditor of the society, he is not bound to present his claim to the tribunals of the society unless such provisions stipulate expressly that he must first submit his claim to the tribunals of the society, before seeking to enforce it in the courts of the land.² The plaintiffs were members of an association which received its charter from, and was subject to the laws and usages of a state association, both organizations being subordinate to a national association or council. Acting under its rules, the state association declared forfeited the charter of the first mentioned association for non-compliance with the constitution, laws, and usages of the state council, and took its property, as provided in its charter. The general laws of the national council provided that a member of the order might appeal from the action of his state or subordinate council, pointed out the steps to be taken, and declared that the decision of a state council should be binding until reversed by the national council. No appeal to the latter was made

¹ *Olery v. Brown*, 51 How. Pr. 92. ² See § 360.

by the plaintiffs, but they at once resorted to the public courts. The court held that a bill in equity by the plaintiffs to recover back their property so taken, on the ground that their charter had been illegally forfeited, could not be maintained until the plaintiffs had first sought the relief prayed for from the tribunals provided by the association.¹ The rights of different persons claiming to represent a subordinate lodge are to be determined by the constitution of the grand lodge, and although a subordinate lodge has done acts which render it liable to have its charter declared forfeited to the grand lodge, yet, until such forfeiture has been declared, it is entitled to possession of the property of the lodge; and a bill in equity can not be maintained against its members to recover possession of such property by persons claiming to be recognized by the grand lodge as the subordinate lodge, until such charter has been formally declared forfeited by the grand lodge, and until the remedies within the society, prescribed by the constitution, have been exhausted.²

§ 112. **Courts may not be ousted of jurisdiction.**—But it has been held that while a society may, by its by-laws, compel members to submit their controversies concerning its property and their rights therein to the tribunals of the society, before seeking the aid of the courts, it may not prohibit them entirely from resorting to the courts. So long as the members of the society recognize its decisions as final on questions of property rights, the law interposes no objection; but when a member refuses to abide by the decision of the society, depriving him of his interest in its property, it is the duty of the courts, on his application, to afford him his proper remedy. The remedy of an expelled member who has, by the judgment of the society, been deprived of his rights in its property, has already been treated of; the question now is, how far the judgments, orders and decrees of the society are binding upon existing members. This question frequently arises in the attempt of a grand or supreme lodge, whose decisions, it is agreed, shall be final, to take from a subordinate lodge its

¹ *Oliver v. Hopkins*, 144 Mass. 175; 136; *Supreme Council v. Forsinger*, 10 N. East. Rep. 776; *Reed v. Ins. Co.*, 125 Ind. 52; 25 N. East. Rep. 129.

138 Mass. 575; *Supreme Sitting v.* ² *Chamberlain v. Lincoln*, 129 Mass. Stein, 120 Ind. 270; 22 N. East. Rep. 70.

property and its rights in the order. It may be laid down as the law that, whatever powers the higher lodges or councils of a society may have to make rules or laws for the government of subordinate lodges, the courts can never recognize as valid any by-law, the effect of which is to give to these higher bodies the final right to determine when, under what circumstances, and for what causes, the property of the subordinate lodges may be taken, nor will the courts permit or recognize the enforcement of any such by-law, when its enforcement will accomplish, and is designed to accomplish, the confiscation of property, or the taking away of property from one set of members to give it to another set.¹ Where the by-laws of an unincorporated society establish an executive board, "to which shall be referred for final action all matters of difference which may arise," and a decision of the board, transferring certain property and affecting pecuniary interests, operates unjustly against any of the members, the enforcement of the decision will be restrained by the courts.²

§ 113. **When courts will not take jurisdiction.**—In questions of doctrine or policy, a society is the sole and exclusive judge. Courts of justice will not entertain jurisdiction on the merits of such matters. They will not inquire whether the decision or declaration of the society upon the subject of its principles is in harmony with the traditions, customs, usages and practices of the society, nor will they examine into the merits of the decision of a society, concerning the policy to be adopted by it in its internal government and administration. The courts take it for granted that the society is the best judge of such matters, and accept its decisions as final. The society being purely voluntary, the person who joins it consents that he will be bound by the principles and rules of government, which it has adopted or may adopt. Although he may be dissatisfied with the action of the society in such matters, he has no right to appeal to the courts unless he claims that such action has injured him in his civil or property rights. In case any civil or property right is affected by such action, the courts will inquire whether the society, under the laws of

¹ *Goodman v. Lodge*, 67 Md. 117; 9 ² *Rudolph v. Southern League*,
Atl. Rep. 13; *Austin v. Searing*, 16 7 N. Y. Supp. 135.
N. Y. 112; see § 311 *et seq.*

the state and the provisions of its charter, had authority to decide upon such questions and to pass such laws, and will examine into the proceedings of the society and determine whether they are regular under the rules prescribed by the society. Courts will not interfere at all in the matters of a society, where there are no civil or property rights involved, and, even where the controversy is concerning such rights, courts will not act unless they see clearly that they are obliged to take jurisdiction. They will only interfere to protect some civil right, or for the due disposal and administration of property.¹ At the regular annual meeting of a society a vote was taken on the adoption of a certain amendment to the constitution. The president decided that the amendment was not carried, for the reason that it did not have the votes of two-thirds of all the members of the association in its favor. Several persons protested against the decision, on the ground that it only required the vote of two-thirds of those present, voting either in person or by proxy, to adopt it.² A petition for a writ of *mandamus* was filed to compel the officers to declare the adoption of the amendment. An agreed statement of the laws of the society and of the facts in the case was also filed in the cause. The court in denying the writ of *mandamus* said: "The question arises, whether from this agreed state of facts it can be inferred that petitioners have shown the slightest pecuniary interest in the settlement of the question raised by the petition. From the most careful consideration of the facts, we are unable to find that they, or either of them, have. It is merely to settle a dispute whether or not a particular proposed amendment to the constitution of the association was adopted. We do not see, nor can we determine that the decision of the question, one way or the other, can or will affect the pecuniary interest of either petitioner. It has ever been held that relief will not be granted to a petitioner until he shows that he has a clear legal right which is denied, and that the denial of the right affects his pecuniary interest. This is a mere fancy question that will not, as now presented, be considered or determined by the court."³

¹ Rigby v. Connell, 28 W. R. 650;
Ellison v. Bignold, 2 Jacobs & Walker
503.

² See § 108; § 127.

³ People *ex rel.* v. Masonic Benevolent Association, 98 Ill. 635.

A court of equity in this country will not interpret the organic laws of a mutual benefit society to determine whether subordinate lodges conform to its tenets, and specifically to direct the conduct of officers and agents in performing their duties, but will accept the decision of the authorized tribunals of the society. To interfere in such matters would amount to administering the internal affairs of such a society.¹ A court will not inquire whether it is necessary to establish other funds and plans of insurance for the protection of the members and their beneficiaries, in addition to those already established in a society, nor will a court restrain the officers of a society in the creation and dispensation of a fund which such society has, within the proper objects of its existence, provided for. These are matters of internal regulation.² Nor will a court interfere to control the discretion of the officers of a mutual benefit society in the management of the funds of a society, as, for instance, to direct them to pay a death benefit from the reserve fund of the society, instead of by levying an assessment when the reserve fund is within the limited amount which it may carry. This is a matter of internal regulation and management.³ It is the essence of a voluntary society and of its right to establish a tribunal for the decision of questions of principle and policy arising upon matters of internal government, that its decisions should be binding and final, subject only to such appeals as the society itself provides for. This power to decide upon such questions is, in some respects, analogous to, and is certainly as necessary as, the power to pass by-laws for the government of the society.

§ 114. Incorporated societies possess the inherent right, and unincorporated societies are usually given the right to pass, alter, amend and abrogate by-laws for the management of their affairs, as their necessities and welfare may require. Their members, or their chosen and authorized representatives are alone vested with the power of determining when a new by-law shall be passed or an old one changed or repealed, and with their discretion courts may not interfere. Were it otherwise, courts would control all corporations, fraternities and

¹ Stadler v. I. O. B. B., 3 Am. L. Rec. 589.

² Crossman v. Mass. Mutual, 143 Mass. 435; 9 N. East Rep. 753.

³ Stadler v. I. O. B. B., *supra*.

societies. It is only where there is an abuse of discretion, and a clear, unreasonable and arbitrary invasion of private rights, that courts will assume jurisdiction over societies or corporations. They will compel adherence to the charter, and to the purpose for which the society was organized, but they will do no more. To justify interference by the courts, and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there is an abuse of power, or, in case of an incorporated society, that the by-law is unreasonable. It is not enough to show that a better or wiser course might have been pursued, for it must be shown that there was an abuse of discretion.

§ 115. **Injunction to restrain illegal or unauthorized act of the society.**—If the officers of a society are about to engage in a method of doing business, or in an enterprise, not contemplated by its charter or articles of association, or are about to apply its funds or credit to other purposes than those specified in such charter or articles, a court of equity will interfere by injunction at the instance of any of its members. In one case the court granted an injunction restraining the society from expending money in sending a committee to Washington to urge congress to pass an amendment to the contract labor law, so as to include foreign actors among those debarred from entering this country under contract, holding that the clause in its constitution, which extends its benefits to “members of the profession in all parts of the world,” made it improper to use its funds in discriminating against foreign actors.¹ A court of equity on a proper bill may prevent the unauthorized use of the funds of a society, and enjoin upon its officers the proper application of them.²

§ 116. **Injunction to restrain society from carrying on business upon erroneous principles and plans.**—An injunction was granted restraining a friendly society from applying any of its funds to the payment of annuities payable according to the rules and plan of the society, when the annuities chargeable on the funds had, in consequence of the erroneous prin-

¹ *Flocton v. Edwin Forrest Lodge*, 4 *Stadler v. District Grand Lodge*, 3 *N. Y. Supp.* 7. *Am. L. Rec.* 589; *In re Equitable Re-*

² *Roper v. Burke*, 83 *Ala.* 193; 3 *serve*, 16 *N. Y. Supp.* 80; *Penfield v. So. Rep.* 439; *Goodman v. Jedidjah Skinner*, 11 *Vt.* 296; *Bailey v. Lewis, Lodge*, 67 *Md.* 117; 9 *Atl. Rep.* 13; 3 *Day (Conn.)* 450; see § 126.

ciples upon which the plan was founded, become so numerous as to be likely to exhaust the whole fund in the hands of the society.¹

§ 117. **Status of unincorporated societies in courts of justice.**—It is exceedingly difficult to define the status of unincorporated societies under the law. It seems that they were entirely unknown to the common law, and that their existence has been recognized in the statutes of very few states. It is acknowledged that an unincorporated society is *sui generis*, but courts do not agree as to the legal principles which they will apply to it. It is generally assumed, in the decisions of courts upon questions involving rights under such organizations, that they must either partake of the nature of corporations or of partnerships, and that, as the law does not incline to give the shield of the acts of incorporation to unincorporated bodies, they must necessarily be governed largely by the rules which govern in matters of partnership. If it be stated that such a society must be regarded as a partnership, it is not difficult to cite numerous authorities as sustaining the proposition;² but it is equally easy to find authorities which hold the contrary doctrine.³ Many cases hold that in some of their relations they are to be regarded as partnerships, and to be governed by the general law of partnerships, and that, in other relations, the law of corporations, in absence of a better rule, is to be regarded as applicable to them. They hold that this distinction is to be made in cases involving the rights of third parties in their relations with the society, or one or more of its members, on the one hand, and in cases involving the rights of members, as between themselves, on the other hand. The general rule founded upon this distinction has been laid down as follows:

“The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations *so far as their rights between themselves are involved*, and will enforce their articles of agreement (nothing

¹ *Reeve v. Parkins*, 2 Jac. & Walk. Womersley v. Merrit, L. R. 4 Eq. 300; see *Pearce v. Piper*, 17 Ves. 1. Cas. 695; *Butterfield v. Beardsley*, 28

² *Gorman v. Russell*, 14 Cal. 537; Mich. 412; *Brown v. Dale*, L. R., 9 *Richardson v. Hastings*, 7 Beav. 323; Ch. Div. 78.

Cockburn v. Thompson, 16 Vt. 321; ³ See cases cited in this section.

illegal or unconscientious appearing) as between the parties to them. But the public and creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such association has the shield of incorporation. Thus, if the controversy is between members of the association, and relates to such subjects as modes of acquiring membership, tenure of the property, division of the profits, transfer of shares, voting, expulsion, dissolution, or the like, the courts may deal with the association by analogy to the law of corporations, so far as the compact between the members contemplates. But if the question is between the association or its members and third parties, and relates to such points as in what name the association may sue, whether members are individually liable to the creditor for debts, etc., a mere compact of association can not vary the rights of strangers to it, but the associates must submit to the general rules of law applicable to the questions raised.”¹ An association for purposes of mutual benevolence among its members only, such as a lodge of Odd Fellows, is not an association for charitable uses. If not incorporated, its members are regarded in law as partners in their relations to third persons, and the property of the association must be appropriated to pay the debts of creditors who are not members, before it can be applied toward payment of the claims of its members.² An unincorporated society organized for relief in sickness, by means of a fund raised by subscription of the members, must be considered in the nature of a partnership, and in a suit against the trustees by some members for an account, alleging a dissolution contrary to the articles, all other members must be parties.³ An unincorporated voluntary society formed for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, and assessments upon its members, partakes of the nature of a partnership.⁴

While a member has no severable interest in the property of such a society, and has no interest which is transmissible, yet

¹ Abb. Dig. Corp., title Association; Brown v. Stoerkel, 74 Mich. 269.

² Rabb v. Reed, 5 Rawle 151; 28 Am. Dec. 650.

³ Beaumont v. Meredith, 3 Ves. & Beame 180.

⁴ Gorman v. Russell et al., 14 Cal. 531; Rabb v. Reed, 5 Rawle (Pa.) 158;

Pearce v. Piper, 17 Vesey 15; Ellison v. Reynolds, 2 Jac. & Walker 511; Reeve v. Parkins, 2 Jac. & Walker 300.

the rights of members in this property, and the modes of enforcing these rights are not materially different from those of partners in partnership property.¹ *Prima facie* the interest of each member in the property of the society is equal and proportionate, but his interest can not be separated and reduced to his possession, until the society has been dissolved, and the rights of all parties in the property have been adjusted and determined. His interest in, and right to use this property may cease by refusal to comply with the contract of association, by death, or by expulsion for improper conduct, and his rights in this regard are far different from the rights of a partner to partnership assets. In one case it was held that the minority of the members are not entitled to a decree of dissolution of the association on grounds which might be urged for the dissolution of a partnership; that a society, where there is no power to compel the payment of dues, and where the right of the member ceases on his failure to make such payment, is not a partnership.² A mutual benefit society formed by several persons who carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society as such, is not to be regarded as a partnership.³

§ 118. **Dissolution of an unincorporated society.**—A court will require a strong case to be made out before it will dissolve an unincorporated society, and decree a sale of the whole concern, but in the dissolution of such an association, it will be governed by the same principles which obtain in the dissolution of partnerships. Not only willful acts of bad faith and fraud, but gross instances of carelessness and waste in the administration of the affairs of the association, as well as the exclusion of members from their just share in the management and benefits of the association, preventing the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract of association by a court of equity. Though the court stands neuter with respect to occasional breaches of agreements between the members of

¹ McMahon v. Rauhr, 47 N. Y. 69. Mich. 106; Caldicot v. Griffiths, 22

² Lafond v. Deems, 81 N. Y. 508. Eng. L. and Eq. 527; 8 Exch. 898;

³ Bear v. Bromley, 11 Eng. Law 23 L. J. Ex. 54; Ash v. Guie, 1 Ont. and Equity, 414; Burt v. Lathrop, 52 493; 97 Pa. St. 493.

such an association, which are not so grievous as to make it impossible for the association to continue, yet, when it finds that the acts complained of are of such a character that relief can not be given to the members, except by dissolution, the court will decree it even though not specifically asked. When it is insisted that the conduct of a majority of the members entitles the minority to a dissolution, the court must consider not merely the terms of the express contract between them, but also the duties and obligations implied in every such contract of association.

If such an association exclude a member from its meetings, because he refuses to take an oath to be administered by the president, which oath is not required by the constitution or the by-laws, and is foreign to the objects of the association, it is ground for a dissolution.¹ Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered.² Before a court will decree a dissolution of a society, opportunity will be given, where it can properly be done, for a correction of the cause of complaint within the society.³ Where a majority of the association have mistaken their powers or duties, and acted under such mistake, and are willing to correct the error, a court of equity will not necessarily dissolve the association, but may give them an opportunity to correct the mistake.⁴ An unincorporated voluntary society for mutual relief having excluded certain members from the association because of their refusal to take an oath not required by its constitution or by-laws and foreign to the objects thereof, these members, as plaintiffs, instituted a proceeding for the dissolution of the society and the distribution of its funds. The supreme court, having decided on demurrer to the complaint that the society was a partnership, and would be dissolved by a court of equity for improperly excluding a member, remanded the cause for further proceedings. The society then rescinded its resolution requiring an oath, and filed an answer offering to admit the plaintiffs to all their rights and privileges.

The supreme court of California held that this action of the

¹ Gorman v. Russell, 14 Cal. 531.

² Gorman v. Russell, *supra*.

³ Lafond v. Deems, 81 N. Y. 508.

⁴ Lafond v. Deems, *supra*.

society sufficed to prevent a decree of dissolution, and that the bill was properly dismissed in the court below.¹ Notice of a special meeting of a society, which does not state the business to be transacted, does not authorize a vote to dissolve the association and dispose of its property.² A voluntary association instituted for moral, benevolent and social objects should not be dissolved by the courts for slight causes, and, if at all, only when it is entirely apparent that the organization has ceased to answer the ends of its existence, and no other mode of relief is attainable. The parties to a proceeding were members of an unincorporated association for moral improvement, relief in sickness and in case of death. In an action brought to dissolve the association, it was urged that the association was divided into factions, that the feelings of hostility between the members were such as to render it impossible for them to agree as to the transaction of its business and the care of its funds, and that the usefulness of the association had departed. By the constitution and by-laws, provision was made for redress of grievances, and for the punishment of parties offending, and it was within the power of the association to suppress conduct of the kind complained of. An appeal was authorized to a higher tribunal. No complaint before the association had been made against the members charged by plaintiffs with a violation of the rules. The by-laws provided that the association should not be dissolved, save by unanimous vote, and that no motion to dissolve should be entertained so long as ten members remained in good standing. The court held that the action was not maintainable; that plaintiffs were at least required in the first instance to resort to the remedies provided by the rules of the association, before seeking the interposition of a court of equity.³

In the same proceeding it was urged as a further ground for the dissolution of the association, that it had hired more room than was necessary for the meetings, that it had fitted up, furnished and sublet the portion it did not require, and rented its own room when not in use, and that it had from these rents accumulated a large fund; but the court held that the

¹ Gorman v. Russell, 18 Cal. 688.

² Lafond v. Deems, *supra*.

³ St. Mary's Association v. Lynch, 64 N. H. 213; 9 Atl. Rep. 98.

association in such matters might exercise a reasonable discretion, and where the renting of rooms was merely incidental to its primary object, and the rents received were the result of accident and good management, in the exercise of a proper discretion, having in view merely the accommodation and prosperity of the association, there was no such accumulation of funds as would call for the dissolution of the association on that ground. In case of violent dissension and irreconcilable differences between the members of a voluntary association, judgment will be rendered at the suit of one or more members against all others, dissolving the society;¹ but no action will be entertained for such a purpose upon mere proof of differences of opinion, bad temper, the ordinary disputes common to such societies, or upon proof of injuries or injustice sustained by one member, through the vote or action of the society, if he have another remedy.² Where the constitution of a society provides that it shall not be dissolved so long as a certain number of members desire its continuance, such provision is controlling in an action to obtain a decree of dissolution, and if that number of members oppose a dissolution when the vote is put in the society, or, if there be no vote, when the action is commenced, dissolution will not be decreed.³ But in an old English case⁴ it was held that a court will not enjoin a society from dissolving itself where a great majority of its members agree to such dissolution, notwithstanding a by-law of the society, providing that if "three agree to hold the society, it shall not be dissolved."

§ 119. **Dissolution of an incorporated society.**—In the absence of statutory provisions, courts of equity have no jurisdiction to decree the dissolution of a corporation, by forfeiture of its franchises, either at the suit of an individual or at the suit of the state.⁵

¹ *Roshi's Appeal*, 69 Pa. St. 462.

⁵ *Attorney General v. Bank*, 1 Hopk.

² *Fischer v. Raab*, 57 How. Pr. 87.

Ch. 354; *Doremus v. Church*, 3 N. J.

³ *Fischer v. Raab*, *supra*; *Lafond v. Deems*, *supra*; *St. Mary's Association v. Lynch*, 64 N. H. 213; 9 Atl. Rep. 98; *Kuhl v. Meyer*, 42 Mo. App. 474.

Eq. 332; *Doyle v. Petroleum Co.*, 44 Barb. 239; *Strong v. McCagg*, 55 Wis. 624; *Slee v. Bloom*, 5 Johns. Ch. 366; 2 Mor. Priv. Corp. § 1040; see § 121.

⁴ *Waterhouse v. Murgatroyd*, 9 L. J. Ch. (old series) 272.

But it has been uniformly admitted, whenever the question has arisen, that jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute. Whether a corporation which is shown, upon a *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it. Where trustees of a society had operated it for their own profit, and had misused and abused its franchise, the supreme court of Ohio said: "The present membership of the defendant numbers about thirty-five hundred, chiefly worthy and deserving people, utterly innocent, if not wholly ignorant of any misuse or abuse of its franchises. Purged of the unfortunate features of its management which this trial has developed, this association is capable of much usefulness. To visit the perversion of its objects by a few, upon the heads of the entire membership, must result in irremediable hardship; and without stating more fully the grounds of our action, or the considerations which move us, it must serve our present purpose to say that the relators' prayer that the defendant be ousted of its franchises to be a corporation is refused. Judgment will be entered, however, ousting it of the use of its franchises for the profit of its trustees.¹

The charter of a benefit society will not be forfeited because it does an insurance business in violation of the statutes, as this would inflict upon many innocent members a severe loss. It will be permitted to wind up its insurance business, and to continue any functions it may have as a fraternal order, or it may amend its charter so as to bring itself within the insurance laws of the state.²

Where it is shown that the scheme of insurance as originally marked out is a failure; that substantial and organic departures must be made from the fundamental scheme, in order to save the society from ruin; that the fund is in danger, and that a large number of the members are desirous of having its affairs wound up, the court will appoint a receiver for the society in

¹State v. Association, 42 Oh. St. 579.

²Order of Alliance v. State, 77 Md. 547; 26 Atl. Rep. 1040.

order to make an equitable distribution of its assets among the persons entitled to them. Where misconduct and misapplication of funds on the part of the officers, fraud and breaches of trust which endanger the fund, are charged and proved, the court will appoint a receiver to protect the property, and, if necessary, wind up the corporation. Mere mistakes, or acts of misuser or non-user are not enough to warrant a judgment of ouster against an incorporated mutual benefit society. Such a society can not be dissolved on account of loss of members, so long as enough remain to supply vacancies and continue the succession.¹ An incorporated society organized under an original act, against which an information in the nature of a *quo warranto* was pending at the time of the passage of an amendatory act, is entitled in such suit to the benefit of the amendment.² Where the statute under which a society is incorporated provides that no part of the funds collected for the payment of death benefits shall be applied to any other purpose, it is unlawful, and a ground of dissolution, for the society to use, in the payment of running expenses, any part of the fund acquired from mortuary assessments.³ In *quo warranto* against an incorporated society, where it has assumed franchises not granted, and it appears that the certificate of incorporation does not comply with the requirements of the statute under which it is organized, the court, in the exercise of its discretion, will oust it of its corporate franchises.⁴ When a foreign corporation, doing business in a state, is exercising its franchises in contravention of the laws of that state, it may be ousted therefrom by proceedings in *quo warranto*.⁵

It is not a ground for dissolution of a corporation, that it provides in its by-laws that contracts may be entered into by it with persons who are not of lawful age, and that it issues certificates of membership to minors in the regular course of its business.⁶ In this case the court said: "The statute under which the association was organized is silent on the subject, nor do we find any statute which either expressly, or, so far as

¹ State v. Société Republicaine, 9 Mo. App. 114.

² State v. Association, 26 Oh. St. 19.

³ Chicago Mutual v. Hunt, 127 Ill. 257; 20 N. East. Rep. 55.

⁴ State v. Association, 29 Oh. St. 399.

⁵ State v. Society, 47 Oh. St. 167; 24 N. East. Rep. 392.

⁶ Chicago Mutual v. Hunt, 127 Ill. 257; 20 N. East. Rep. 55.

we can discover, by implication, either permits or forbids their admission to membership. If, then, minors are ineligible, such ineligibility arises from some principle growing out of the nature and objects of these associations, or the policy of the law applicable thereto. The contention is that the certificate of membership is a personal contract between the member and the association, and that, as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. We may admit, in the broadest sense, that these societies are founded upon the principle of entire mutuality in relation to burdens as well as benefits, yet we are unable to see how that principle places the membership of infants upon any footing different from that of adults. While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void, and the membership ceases. But the making of an assessment or the maturing of dues does not make the member a debtor to the association so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion. The contract, then, not being one which has the legal effect of binding him to the payment of any money or the performance of any condition, we cannot see how it can be at all important whether it is voidable or otherwise.

“Performance is no more left to the option of the member where the contract is made by an infant than when made by an adult. If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all. We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. ‘If an infant advances money on a voidable contract which he afterward rescinds, he can not re-

cover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained by fraud.'¹ Nor are we able to see any force in the suggestion that minors should not be admitted to membership because of their incapacity to act as trustees, or to perform the duties of members at corporate meetings, such as consulting or giving advice for the mutual benefit of the members, voting for officers, and the like. We know of no reason why the capacity to act as trustee should be a necessary qualification for membership. If a sufficient number of members possess the requisite capacity, so as to afford the members a reasonable and proper range of choice in the selection of trustees, the admission of others who are not thus qualified can work no injury to anybody. It will not be claimed that the want of the requisite intelligence or business experience on the part of an adult to qualify him to act as trustee would render him ineligible to membership. But these are quite as essential to the proper discharge of the duties of trustee as mere legal capacity. There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising, or even voting. The only objection to their doing so grows out of their inexperience and the immaturity of their judgments. But these are disqualifications which are not necessarily confined to persons under the age of twenty-one years, and no one would allege them as a legal bar to the admission of an adult to membership. It should be remembered that in this proceeding we have nothing to do with the good or bad policy, in an economic or business point of view, of admitting minors to membership. Whether it was wise or unwise is not the question. We have only to determine whether it was such a violation of the rules or policy of the law as should subject the association to dissolution. On this point we are unable to agree with the learned chancellor before whom the cause was heard; our opinion being that, so far as this charge is concerned, the decree is not sustained."²

A statute provided that the affairs of mutual benefit societies should be managed by not less than five directors, trustees,

¹ 1 Pars. Cont. 332.

tual Ben. Assn., 135 N. Y. 280; 32 N.

² But see *contra*, *In re Globe Mu-* East. Rep. 122.

or managers, elected from and by the members. A certificate of association provided for a board of eight trustees, to be elected annually. At first the manager and secretary were appointed by the trustees, but in 1886 a resolution was adopted that the manager and secretary should thereafter be elected annually by the members. Blank applications for membership then in use by the association had printed upon them a blank proxy, authorizing the person whose name should be inserted to act and vote for the member at all meetings, and underneath it was a request to the applicant to sign it in blank, to be filled up by the secretary. In accordance with this request a great number of such proxies were so signed and sent to the secretary. The resolution above mentioned was adopted mainly by the use of such proxies. From that time on the board of trustees practically ceased to control, the real governing authority being the manager and secretary, who held a sufficient number of these proxies to perpetuate themselves in office, and conducted the association as they saw fit. It was held that this was a violation of law, and a fraud on the members, justifying dissolution.¹ It is sufficient ground for dissolving the association, that the books containing the accounts of receipts and expenditures are so confused and unsystematic as to make it almost impossible, even by the aid of experts, to derive therefrom any certain information as to the financial affairs of the association.²

Where a statute provides that associations organized thereunder may provide for an accumulation of a surplus or guaranty fund, which shall belong to the association and not to the officers, "and shall be used only for mortuary benefits, without assessment, or applied in payment of future assessments, or otherwise used for the promotion of the object for which such funds are specially provided and set apart, and such use shall not be deemed or construed to mean a profit received by members;" and where a society organized under this act created a tontine reserve fund, by reserving twenty-five per cent of the assessments for death benefits, for the apportionment of which fund the members were divided into classes, the surviving persistent members of each class to receive a distribution at the end of ten years, it was held that

¹ Chicago Mutual v. Hunt, *supra*.

² Chicago Mutual v. Hunt, *supra*.

such disposition of the reserve fund was a direct violation of the statute, justifying dissolution.¹

§ 120. **When a society is dissolved by its own act or neglect.**—A society, in which persons must be elected to membership by the votes of existing members, is dissolved by the death of all the members, whether it be incorporated or unincorporated.²

A legal surrender of the corporate franchise of a mutual benefit society will not be presumed from non-user, or from failure to collect dues, or to hold meetings for six months or any short period of time.³ A chapter of Free Masons, in 1836, disposed of all their real and personal property, consisting of their hall, furniture and equipment, pursuant to a vote of the chapter, and for twenty-three years held no meetings, elected no officers, performed no acts required by its by-laws and rules, and ceased to have any visible sign of existence; it was held that the legal existence of the chapter was gone, and that it was beyond the power of the state chapter to restore it to life so as to preserve for it a continued existence from 1836. A rule of the society that the officers should hold their offices until their successors were elected, could not, in such a case as above stated, operate to preserve its legal existence.⁴ The grand lodge of a society can not make new regulations subversive of fundamental principles and landmarks of the order, without the clear consent of the subordinate lodges; nor can the officers of a corporation composed of several integral parts dissolve the corporation, without the full assent of the great body of the society. The dereliction of the charter by the heads of the corporation does not dissolve the corporate body especially if the remaining members have the power of renovating the head.⁵

¹ Chicago Mutual v. Hunt, *supra*.

⁴ Strickland v. Pritchard, 37 Vt. 324.

² Morawetz on Corp., § 1009.

⁵ Smith v. Smith, 3 Desau. (S. C.)

³ State v. Société Republicaine, 9 Mo. App. 114.

557; see State v. Société Republicaine, etc., 9 Mo. App. 114.

CHAPTER IX.

JURISDICTION OF COURTS OVER SOCIETIES.—PART II.

- § 121–125. Dissolution, trust funds, distribution of property.
- 126. Trust funds of a society.
- 127. Rights of contributors to funds.
- 128. Rights of members in property and funds.
- 129. Revocation of social and fraternal charter.
- 130. Mutual benefit society is not a public charity; taxation.

§ 121. **Dissolution, trust funds, distribution of property on dissolution.**—The dissolution of a voluntary society can not be prevented. It is in the power of any association, whether incorporated or not, except such as are created for the administration of political or municipal authority, to dissolve itself by its own assent. This has been repeatedly adjudged. But it by no means follows that the members of a society holding funds in trust, or of a body incorporated for eleemosynary purposes, can on such dissolution appropriate its funds among themselves. Mere monied corporations, in which the funds are owned solely by the stockholders, and are not held in any manner for charitable or public use, may do this, but no others. The society may be dissolved, but the trust fund is not, therefore, to be either distributed or abandoned. It is an established maxim in equity that no trust shall fail for want of a proper trustee. Such fund may be saved to carry out the original purposes and wishes of the donors or contributors. Although a court of equity may not decree a dissolution of an incorporated society unless that power be expressly conferred by statute,¹ yet, in virtue of its general jurisdiction over trusts, it has jurisdiction to grant relief against an incorporated society upon the same terms as against an individual under similar circumstances, and it will interfere to prevent an actual or threatened misapplication of its funds.

¹ See § 119.

Where the funds of a masonic lodge have accumulated under a by-law providing that they shall be appropriated "for the good of the craft, or the relief of indigent and distressed worthy masons, their widows and orphans," these funds are in the hands of the acting members for a charitable use, and a dissolution of the lodge and a division of the funds among the acting members for their private use, is a violation of the trust on which they were raised.¹ In 1870, a subordinate charitable society was incorporated, chartered and organized under the powers and regulations of the general council of the association. One of the provisions of its charter was that, if it should dissolve, its charitable funds should be paid over to the general council, and be held and disbursed by the latter, according to its rules. These rules provided for holding the funds by that council in trust for the purposes to which the widows' and orphans' fund was devoted originally, and for refunding them if the subordinate council should reorganize. In 1881, the subordinate council voluntarily disbanded, surrendered its charter to the general council, and, under a resolution, divided all its charitable funds among its members then in good standing. The court held that it had jurisdiction to compel those participating in the division to refund to the general council the money so received by them.² A mutual benefit society which has created an endowment fund can not, on being refused a license by the state in which it was incorporated, and thus being compelled to cease business, organize a new company, and, against the protest of parties insured, use such endowment fund to obtain reinsurance of the old members in the new society; and the members insured, in such case, may proceed in a court of equity to wind up the affairs of the old society and compel the distribution of such fund among those for whose benefit it was created.³ A contract by which an incorporated mutual benefit society undertakes to pay from its own mortuary fund the losses of another society is *ultra vires* and void.⁴

The minority of the members of a lodge, having been out-

¹ Duke v. Fuller, 9 N. H. 536.

⁴ Twiss v. Association (Iowa), 55

² State Council v. Sharp, 38 N. J. N. W. Rep. 8.
Eq. 24.

³ Stamm v. Association, 65 Mich.
317; 32 N. W. Rep. 710.

voted upon the question of the disposition of its funds, brought an action against its trustees, charging them with an intention to divert the funds, and, by concealing the fact of the vote, obtained an injunction and the appointment of a receiver, which action the court revoked upon full information. Subsequently the district grand lodge, at the instigation of the minority of the lodge, revoked the fraternal charter of the lodge referred to, and thereupon the minority filed a bill in their individual names for a proportion of the funds, alleging that the lodge had ceased to exist "through no fault of theirs." The court held that the conduct of plaintiffs, who had voluntarily seceded from the lodge, and formed a separate lodge under authority of the district grand lodge, was so unfair and inequitable as to preclude them from relief. Courts will never recognize as valid any rule or law of a mutual benefit society, the effect of which is to confiscate property, or arbitrarily take away property rights from one set of members and give them to another set; and where a minority of the members claim title to the property of the society under an arbitrary forfeiture of the charter of a subordinate lodge by the supreme lodge of the society, they can not recover.¹

The facts in this case showed that the trustees had appropriated from nine to ten thousand dollars of the funds of the old society, amounting to about fifty thousand dollars, and had paid the same to the new society for reinsurance of members who had insured in the new company and accepted a cancellation of their certificates of membership in the old society. The court said: "These facts show the necessity for the interposition of a court of equity to prevent a further misapplication of the funds of the old association, and to decree an equitable distribution thereof. Otherwise, what is to become of this large accumulation of money now in the hands of the trustees? The new association is not entitled to it. The trustees have no right to appropriate it. It can not be used in carrying out the purposes for which it was created. There is no equity in applying it to the payment of death losses in full, as they occur, for, aside from there being no contract to that effect, it would, in the natural course of events, be exhausted long

¹Goodman v. Jedidjah Lodge, 67 Md. 117; 9 Atl. Rep. 13; see §§ 128, 129.

before membership in the association would be terminated by death, and the surviving members would receive nothing." If there has been a perversion of the funds of a society, a court of equity, on a proper bill may prevent the further unauthorized uses of them, enjoin on its officers the proper appropriation of them, and hold such officers to account for the amount perverted.¹

§ 122. Where the contract of insurance provides for a reserve fund to be used only for mortuary benefits, without assessments, or applied otherwise for the promotion of the object for which, by the by-laws, it is set apart, it is a trust fund, and may not be diverted from such objects. Under such a contract, a society had accumulated a reserve fund of \$518.68, but, despairing of success, the directors and the society filed a bill to wind up the corporation. The beneficiary of a member who died subsequent to the filing of the bill filed a cross-bill, claiming that there was due from the society eighty per cent. of the amount which could be collected from the certificates in force, not to exceed \$1,000, alleging that all other claims had been paid except his, and that there remained in the reserve fund the above amount; and asking that this money be decreed to him. The directors set up by way of answer to the cross-bill that they had advanced \$1,058.51 from their own money to pay the last claim against the society, in favor of one Pierce, in order to avoid making an assessment; that when the resolution was passed to wind up the corporation there was in the reserve fund \$518.68, and that said sum was applied in payment to the directors upon the amount which they had advanced to the death fund, and that there was still due the directors something over \$500. The court below found that the claim of this beneficiary was the only outstanding claim against the society on account of a death loss, and that there was in the hands of the directors \$518.68 belonging to the reserve fund, realized from assessments for death losses, and ordered the directors to pay that sum to the claimant. On appeal the court said: "We think this action of the court was correct. It was the duty of the directors to make an assessment upon the members to pay the death claim of Pierce, and if, instead of doing so, they saw fit to advance their own

¹ Roper v. Burke, 83 Ala. 193; 3 So. Rep. 439.

money to discharge said claim, they did not thereby gain a right to appropriate the reserve fund in payment to themselves of such advance, so long as there was any certificate holder who had the right to have such reserve fund paid out to him as a mortuary benefit. By force of the statute,¹ and under the terms of the certificates which the association issued, such reserve fund was a trust fund to be used only for mortuary benefits, without assessments, or applied otherwise for the promotion of the object for which, by the by-laws, it was set apart. The advance of the directors made them only ordinary creditors, and the trust fund could not be used to pay such debts, if there were trust purposes to which it could be applied. No doubt the act of the directors in advancing the money was in good faith, and done for what they regarded as the best interest of the association, but the good faith of their act in advancing the money did not take them out of the class of ordinary creditors. * Those holding death claims have the first right to be paid out of the reserve fund when the association is not in a condition to pay their claims by a regular assessment."²

A death claim, which had been approved before the levy of the last assessment made before suit, has no priority over other death claims where the assessment in question was not made to satisfy that particular claim, but merely to increase the death fund.³ The constitution of a society provided that the reserve fund should be paid only to those members who were living when the fund was to be divided, and who had paid all assessments. After the suit to dissolve the society had been begun, an assessment was made by order of court. It was held that those who paid such assessment were entitled to be repaid such assessment in full out of the reserve fund, and that the balance should be divided *pro rata* among those members who had paid all assessments up to the commencement of the suit, regardless of the last assessment, since the pendency of the suit was a sufficient excuse for the members who failed to pay the last assessment.⁴ The constitution of a

¹ Sec. 129, Chap. 73, Starr & C. Illinois Statutes.

² Wilber v. Torgerson, 24 Ill. App. 119; see *In re Equitable Association*, 16 N. Y. Supp. 80.

³ *In re Equitable Association*, 131 N. Y. 354; 30 N. East. Rep. 114, modifying 16 N. Y. Supp. 80, *supra*.

⁴ *In re Equitable Association*, *supra*.

society provided that assessments should be applied to the creation of two distinct funds, one of which was a death fund, and the other a reserve fund; that death claims should be paid from the death fund, and that no death claim should be paid from the reserve fund, except on a contingency which had never happened. The society was dissolved and a receiver placed in charge of its property. It was held that although the death fund was insufficient to pay the death claims in full the beneficiaries were not entitled to share in the reserve fund. The time at which to determine who may share in the reserve fund and who may share in the death fund, is the date of the commencement of the suit, and not the date of the decree of dissolution.¹ Where the by-laws of a society provided for the payment of a specific sum to each member in case of sickness or disability caused by accident, and, in case of death for the payment of a sum to his beneficiary, on dissolution and distribution of its assets, the claims of members for benefits in cases of sickness beginning or accidents occurring before dissolution, as well as cases of death, will be held to be preferred claims. The right to benefits does not terminate with the dissolution.² On dissolution death losses must be paid *pro rata*, although an assessment for a particular loss has been made and collected, but not paid over.³

The charter and by-laws of a society created a mortuary fund and a security fund. It was provided that if the society, after a specified time, should be unable to pay out of the mortuary fund, the maximum indemnity called for by the certificates issued, then it should be the duty of the trustees at once to convert the security fund into money and distribute the same "among the holders of the certificates then in force, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force. It was held that representatives of deceased members, whose certificates had not been paid in full out of the mortuary fund, were not

¹ *In re Equitable Association, supra*; but see *Commonwealth v. American Life (Pa. St.)*, 29 Atl. Rep. 660. *Commonwealth v. Ins. Co.*, 119 Mass. 45; *Taylor v. Ins. Co.*, 46 Minn. 198; 48 N. W. Rep. 773.

² *Baltimore v. Association*, 77 Md. 566; 26 Atl. Rep. 1045; see *Mayer v. Attorney General*, 32 N. J. Eq. 813; 501. ³ *Ellerbe v. Association*, 106 Mo. 13; *Ellerbe v. Association*, 114 Mo. 13.

entitled to priority over living members in the distribution of the security fund, but that both classes were placed on equal terms, and that the fund should be divided among the living members and the representatives of deceased members in proportion to the amount of their respective certificates.¹ Where a foreign corporation, consisting of a governing body and local branches, becomes insolvent, and the by-laws require a part of each assessment received by the local branches to be set aside as a reserve fund, to be the property of the governing body, but to be retained by the branch and invested by it, the reserve fund of a branch in one state will be distributed among the members of such branch in proportion to the assessments paid by them.²

§ 123. It may be stated on principle and authority that when a corporation is virtually dead, although the term of its existence as limited by law has not expired and it has in its possession property or assets which can not be used in carrying out the purposes of its organization, courts have jurisdiction to distribute such property and assets among its members or beneficiaries upon such a basis as shall be just and equitable. Where the functions of a corporation have ceased, its managers are bound to account for all moneys belonging to it, and when such moneys are improperly retained by them, the court will on proper application enter a decree against them and recover the funds, in order that they may be distributed among those persons who are equitably entitled to them.

A mutual benefit society, the dues of which were to be used to pay to the widows of members fifteen dollars per month during widowhood and good deportment, in the judgment of the directors, being dissolved, the fund in the treasury at the time of the dissolution was ordered to be distributed as follows: The valued annuity, by annuity tables, of each widow's life, at the date of dissolution, at the rate of fifteen dollars per month, must be first ascertained, without taking into consideration the possibility of her marrying again, or not properly conducting herself, and the fund, if insufficient, paid

¹Kentucky Mutual v. Turner, 89 Ky. 666; 20 S. W. Rep. 386; see Supp. 272; 3 Misc. Rep. 214.
Commonwealth v. Am. Ins. Co. (Pa. St.), 29 Atl. Rep. 660; Id., 29 Atl. Rep. 707.

pro rata, and if sufficient to pay the annuities in full, the remainder to be divided equally among the members surviving at the date of dissolution. The widows of those dying since dissolution were not to have their annuity value reckoned and allowed, but were required to work out their rights through the estates of their deceased husbands. The rights of a widow who remarried prior to distribution ceased on such remarriage, though she again became a widow, for she is then the widow of the last, and not of the first husband. Where, by reason of the surviving members not being made parties, no final distribution was made, and by reason of some of the widows who were made parties being in default for answer, another widow receives, under decree of court, more than the present value of her annuity, she is not to be compelled to repay the excess, on the stockholders being made parties, and the other widows then insisting on their rights. Where, by investment of the fund after dissolution and before final distribution, it has increased, each widow is entitled to the portion of the net accumulations produced by the investment of the amount due her on her annuity value.¹ A mutual benefit society, organized to pay monthly to the widows of members a sum of money, which has the right to dissolve at any time on the votes of a certain number of members, if so dissolved, can not be administered by a court of equity in perpetuity, by the continued collection of dues, but the funds in the treasury must be distributed, and the society wound up.²

The certificates of a mutual benefit society provided for payment of death benefits, not exceeding \$1,000, by assessment on its members, and for payments to a "safety fund," which was to enure to the benefit of members of five years' standing by having the income of it, after five years, or after it had amounted to \$100,000, applied to the payment of future dues. If after that time, the association should fail to pay the indemnity provided in the certificates, the fund was to be divided among all the holders of certificates then in force, but the fund should "be in no way chargeable or liable for any use or purpose except as above mentioned." The society failed before the five years, and while the fund was only \$19,000.

¹ Collier v. Association, 1 Cin. Law Bulletin 18. ² Collier v. Association, *supra*.

The supreme court of Massachusetts held that the safety fund must be divided among all the holders of certificates in force, or their legal representatives, in the proportion which the amount of the certificates of each should bear to the amount of the whole number of certificates in force; that the date to be adopted in taking this account should be the date of the filing of the bill for the dissolution of the society; that the safety fund could not be taken, by attachment or otherwise, by the holders of death claims, notwithstanding general expressions on the back of the certificates asserting that the society provided substantial protection for the families and dependents of deceased members by means of the safety fund; that the legal representatives of holders of certificates who died without having incurred any forfeiture, and who had not had any benefit from an assessment to pay the death loss, though not entitled to maintain any claim upon the safety fund in consequence of such death, should share in the division.¹ Where, in such a case, the by-laws of the society provide that a certificate shall lapse by reason of the non-payment of a certain sum toward the safety fund within one year from the date of the certificate, the payment of such sum after a bill for dissolution has been filed, but within one year from the date of the certificate, will keep it in force so as to entitle its holder to share in the safety fund, but, unless it appears that such payment was made within the year, the holder is not entitled to share in it, for it is manifestly contrary to the true intent of the contract to permit holders who have contributed nothing toward it, to share in the division of the fund. The non-payment of an assessment made prior to the filing of a bill for dissolution, within the time limited for its payment, after notice given as required, will invalidate a certificate, so as to preclude its holder from sharing in the safety fund.²

¹ *Burdon v. Mass. Safety Fund Assn.*, 147 Mass. 360; 17 N. East. Rep. 874; 6 N. Eng. Rep. 840; see *Mayer v. Attorney General*, 32 N. J. Eq. 815; 9 Ins. Law Jour. 671; *Bank v. Bank*, 23 Pick. 480, 489.

² *Burdon v. Association*, *supra*. The Order of the Golden Lion, a mutual benefit insurance corporation, was organized under statutes of Massachusetts, 1888, c. 429, as amended by St. 1890, c. 341, which provided that all the money derived from the first-class assessments therein provided for should be divided into two funds,—one to be set aside as a reserve fund for the exclusive payment of matured endowment certificates,

§ 124. The filing of a bill to wind up an incorporated society, is an invitation to all persons to present their claims against it, and in such a case, claims not due at law will be accelerated so as to share in the assets. It would be flagrantly

and the other to constitute a benefit fund, to be applied exclusively to the payment of disability benefits,—and that no portion of the moneys so received should be used for any other purpose. The act further provided for assessments to meet expenses. A receiver was appointed for the corporation in a suit to wind up its affairs. *Held* that, though the business prosecuted by the corporation may have been illegal, and *ultra vires*, the certificate holders are not entitled to recover the moneys paid by them in assessments and initiation fees, as for money had and received, but, in distributing the assets, each should receive from the fund derived from assessments of the first class a dividend in proportion to the amount paid by him into that fund.

The date of filing the bill for a receiver of the corporation is to be taken as the date which fixes the rights of the parties.

The law governing such corporations provided that any member who should fail to pay an assessment within thirty days from the date of the call should stand suspended, but that thirty days should be allowed for reinstatement, by the payment of a fine. An assessment was laid September 19th, payable October 19th, and the right to reinstatement expired November 18th. The bill for a receiver and an injunction was filed November 18th, and service made, and an injunction granted, November 19th. It did not appear that the members knew of the injunction on the 18th, or were prevented from paying their assessments. *Held*, that holders of certificates who failed to

pay the assessment by November 18th are not entitled to prove their claims against the assets. Members, however, who failed to pay an assessment laid October 20th, payable November 19th, are entitled to prove their claims, as they were excused by the legal proceedings on November 19th from payment to procure reinstatement.

Payments made to a certificate holder on account of sick or disability claims are to be deducted from the money paid in by him, and the balance, only, is provable; but no computation of interest should be made on sums paid for sick or disability benefits.

Though, while the business of the corporation was carried on, the relations of the certificate holders to it were such that their rights under their certificates could not be assigned, after the injunction against further business they could assign their claims, subject to rights of set-off and other equities against them.

An assessment for expenses was made, and some of the certificate holders paid the same, prior to the injunction. The general fund appropriated for expenses in the receiver's hands was insufficient to pay creditors of the corporation in full, but payment of the assessment by all the certificate holders would give more money than needed. *Held*, that the assessment should be treated as valid, and enforced for a sum sufficient to pay the debts. Those certificate holders who have paid the assessment should have their proportion deducted therefrom, and the balance refunded, and those who

unjust for the court to proceed to wind up a corporation and distribute its assets, part of which are trust funds, and leave unpaid a just claim entitled to have such funds appropriated to its discharge, because if the society was continuing in business, it could not be sued thereon at law until after the lapse of a given number of days. A certificate issued to a member, provided, among other things, that within sixty days after the receipt of evidence by the society of her death, it would pay to her husband the amount of one assessment. The directors of the society filed a bill to wind up the corporation, and afterward the member died. Her husband, as the beneficiary of her certificate, immediately after her death filed a cross-bill claiming that the amount of the reserve fund should be paid him on the death claim. The society objected that the claim was premature, as it would have sixty days after notice of death in which to pay it; but the court held that as the original bill was filed to wind up the society and distribute its assets, and the claimant had an interest in the subject-matter of the proceeding and had filed his cross-bill for a proper purpose, to wit, to prevent the misappropriation of a trust fund, the court had full jurisdiction of the whole matter and a right to do complete justice by ordering the fund to be paid to him.¹

have not paid should have their proportion of the debts deducted from their dividends.

The holders of certificates, who have lost their right to prove claims against the reserve or benefit fund by failing to pay assessments, can not escape the effect of such failure by showing that the assessments were illegal because of irregularities, where they allowed the other certificate holders to pay, and failed to make such objection, or make it known that they would insist on their rights.

Holders of certificates, who received checks in payment of sick or disability benefits, or otherwise, and failed to collect them before the corporation was enjoined, are not entitled to have the checks paid in full, but may prove the same against the

fund derived from the first class of assessments, but not against the general or expense fund. *Fogg v. Supreme Lodge*, 159 Mass. 9; 33 N. East. Rep. 692; see *Fogg v. Supreme Lodge*, 156 Mass. 431.

¹ *Wilber v. Torgerson*, 24 Ill. App. 119. Under Rev. St. § 1222, of Indiana, providing that a receiver may be appointed when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, a court of equity has jurisdiction to appoint a receiver in proceedings to secure an accounting of the officers, and the application of the funds to the proper objects of the corporation. The right to have a receiver appointed for a corporation exists as well in a policy holder therein,

Where a mutual benefit association, with branches in several states, becomes insolvent, and a receiver is appointed, the benefit and reserve funds should be proportionally distributed among the certificate holders, regardless of their residence, to which end certificate holders who have attached property of the association will be excluded from any share in such funds unless they release such attachments or account for the property in their possession.¹

A voluntary association of individuals who have contributed funds for a public purpose will be regarded as a charity, and a court of equity has jurisdiction over the parties. Funds supplied from private gifts for legal, general or public purposes are charitable funds to be administered by a court of equity. Where the association is for private and individual profit or pleasure, with no public object, it is treated as a co-partnership. So, where the association is for private emolu-

though his debt be not due, as in a creditor of such corporation. In a proceeding by policy holders to have a receiver appointed for a mutual benefit association, a complaint alleging that it is insolvent; that its assets amount to \$1,000,000; that its officers have converted \$750,000 to their own use, placing them in a bank under their control, without security, save the money so deposited; that the money due the corporation from branches in the various states is only secured by the indemnity of such irresponsible bank; that the chief officer, who has misappropriated the funds, and whose duty it is to call meetings of the board of managers, fails to do so, and refuses to allow the proceedings to be published as required; and that a large sum will fall due on certificates within about six months from the filing of the complaint—states ample cause for the appointment of a receiver. *Supreme Sitting v. Baker*, 134 Ind. 293; 33 N. East. Rep. 1128.

¹ *Garham v. Society* (Mass.), 37 N. East. Rep. 447.

Acts 1888, c. 429, of Massachusetts, authorizing the incorporation of "fraternal beneficiary organizations," provides (section 8) that "any corporation duly organized as aforesaid, which does not employ paid agents" in soliciting business, "and which conducts its business as a fraternal society on the lodge system," may pay a benefit to the member or his family. It was held that where a corporation, organized under such act, provided for the payment of a benefit to members at the end of a year out of a fund created by assessments levied for that purpose, but employed paid agents to solicit business, members to whom such benefit certificates had been issued might refuse to pay further assessments without forfeiting payments already made, and were entitled to have the fund so accumulated distributed among the certificate holders. *Fogg v. Supreme Lodge*, 156 Mass. 431; 31 N. East. Rep. 289; see *In re Order of Fraternal Guardians*, 159 Pa. St. 594; 28 Atl. Rep. 482.

ment, or for benevolence, confined exclusively to the members, and in which none others participate, as between themselves they are partners. But a private unincorporated association for general purposes of public utility, a court of equity will not treat as a partnership, nor declare its dissolution and divide its assets among the members composing it. Property given to such an association is pledged to the objects for which it was intended to be applied by the successive contributors, and can not be diverted from them, while those remain who are ready and willing to execute the public trust with which it has been clothed. A court of equity will not suffer its funds to be diverted to other uses than the donors intended.¹ In private unincorporated associations of individuals for public purposes, the majority can not bind the minority in the disposition and management of its funds, except by special agreement, and in the manner and to the extent stipulated in the agreement.²

§ 125. A decree had been entered dissolving an incorporated mutual fire insurance company, and the court was called upon to decide what should be done with its assets. The conclusion reached by the court was not in accord with the decisions which have just been cited, and the decision may well be stated at length. The court said: "Our statutes contain ample provisions for the disposition of the assets of stock companies, but this is a mutual company and has no stockholders, and the provisions cited do not apply. According to the old settled law of the land, says Chancellor Kent, upon the civil death of a corporation, when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the people.³ But it is said that in this class of cases the incorporators named in the act of incorporation should be regarded as stockholders. They are not stockholders; and to hold that they are would be a fiction, and fictions are not favored, and are never resorted to except to work out some strong and inherent equity; and there is no such equity in favor of the incorporators of a mutual insurance

¹ Thomas v. Ellmaker, 1 Par. Sel. 573; Kuhl v. Meyer, 42 Mo. App. 474. Cases (Pa.) 98.

³ 2 Kent Comm. (10th ed.) 385-386;

² Thomas v. Ellmaker, *supra*; Livingston v. Lynch, 4 John. Ch. (N. Y.) Ang. & A. Corp. (2d ed.) c. 22, § 6.

company. They contribute nothing toward its assets, and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses; and then, when a surplus had been thus obtained, to divide it among themselves, and thus reap a profit from a business in which they had invested no capital and had taken no risks; and this, at the expense of the policy-holders. We think there is a much stronger equity in favor of the former policy-holders, whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired, and their premium notes have been canceled, or given up to them. They have received in full the benefits for which they contracted, and are no longer members of the company; and to distribute among them a small amount of assets, and to determine what each former policy-holder's share ought in equity to be, would be attended with difficulties, and an amount of labor which the end would not justify. When a man dies leaving no wife or kindred, his property descends to the state; and when a corporation which, like a mutual insurance company, has no stockholders, ceases to exist, we are not prepared to say that the rule of the common law, which gives its surplus assets to the state, is not a wise one."¹

§ 125. **Trust funds of a society.**—It has been held that money contributed by the members of a society to a common fund, to be applied to the relief and assistance of its members when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity.² There is, however, a distinction between a fund contributed by the members of a society, to be employed and disposed of among themselves as they may agree, and a gift conferred as a matter of bounty upon such society, in trust to be distributed in charity. Where the fund belongs to the first class, courts of equity will not, as a general rule, interfere with the mere administration of the fund, for this would be a virtual administration of the internal affairs of the society.³ In such a case, to authorize the court to interfere, it must be shown that

¹ *Titcomb v. Ins. Co.*, 79 Me. 315; 9 Atl. Rep. 732; 4 N. Eng. Rep. 411.

² *Rabb v. Reed*, 5 Rawle, 151.

³ See § 114.

the fund is distinctly impressed with the qualities of a trust, and that the trust has been, or is about to be, violated by a misapplication of the fund. Whether a fund formed by the contributions of the members of a society has been impressed with a trust and so accepted, is a question of fact always open to judicial inquiry, and whether the alleged trustee be an individual, or a collective body of individuals, incorporated or otherwise, no act, declaration, or decision of such trustee will prevent such inquiry. If the terms of the alleged trust are contained in an instrument of gift, that instrument will be examined and the intentions of the donor carried into execution. If expressed in the articles of association of a voluntary society, these articles will be carried into specific execution for the purpose of enforcing the trust, and if in the fundamental law, or in the ordinances and by-laws of a society, on the faith of which contributions have been made, the court will adopt the construction of the members, and apply relief according to their own views of the law.

An ordinance of a society, which provides for the creation of a fund for the benefit of the widows, orphans, heirs, or designated beneficiaries of the members, and commits the administration of such fund to the officers of the society, impresses any money paid into such fund with the qualities of a trust for the special purposes expressed therein; and the fund thus formed can properly be applied only in that particular manner pointed out in such ordinance, which, in this regard, is to be treated as an express declaration of trust. Where funds have been contributed by members of a society, under its by-laws, for the exclusive benefit of its own members when in sickness and distress, and have accumulated in the treasury, such by-laws will be treated as declarations of trust, and a court of equity will not permit such accumulations to be diverted from the specified objects. And funds collected by the separate lodges of a mutual benefit society from their own members, for the exclusive benefit of the members of each lodge, are held in trust for the special purposes expressed in their by-laws and ordinances, which are to be treated as express declarations of trust, and the appropriation of any part of such funds to a new purpose, by order of a representative body, governing the subordinate lodges, is a misappropriation.

tion which a court of equity will restrain, on application of members of such lodges.¹

Where a number of persons belonging to a society were killed and injured by a cyclone, and a call is made on the different branches of the society for financial aid for the sufferers, the money sent to it in response to the call is given to it in trust, to be distributed among the sufferers in proportion to their necessities, and the society has no discretion as to how much shall be distributed, but is bound to distribute the whole sum.² In such a case, the contributions are made to relieve the necessities of sufferers, and the sum necessary for that purpose is to be estimated by the contributors; and, as the sum necessary for that purpose depends upon the opinion of each contributor, there can be no surplus, and the contributors can not recover back any part of their contributions, unless on the ground of mistake or fraud. The power of the trustee does not extend so far as to withhold any part of the fund, where there is no complaint on the part of the contributors.

§ 127. **Rights of contributors to funds in the custody of the society.**—The contributors to a fund placed in the custody of a society for a specific purpose have a right to have repaid to them, in proportion to their contributions, any surplus not needed for the object. The claim is founded in equity, and will be enforced in the courts. This fund is in the control of the society only for the purpose for which it was raised. It may be disposed of for any purpose within the object for which it was contributed, at any regular meeting of the society, by the voice of the majority of the members present, even if a minority of the whole number.³ But the vote must be for some purpose for which the money was contributed. A majority can not devote the money of the minority, or even of a single member, to any other purpose without his consent. All persons present at the meeting at which the vote

¹ See § 115; *Stadler v. District Grand Lodge*, 3 Am. Law Record, 589; *In re Equitable Reserve*, 16 N. Y. Supp. 80; *Goodman v. Jedidjah Lodge*, 67 Md. 117; 9 Atl. Rep. 13; *Thomas v. Ellmaker*, 1 Par. Sel. Cases (Pa.) 98; *Kuhl v. Meyer*, 42 Mo. App. 474; *Cary Library v. Bliss*, 151 Mass. 364; 25 N. East. Rep. 92; *Peter v. Carter*, 70 Md. 139; 16 Atl. Rep. 450; *Trustees v. Adams*, 65 N. H. 225; 18 Atl. Rep. 777; *Penfield v. Skinner*, 11 Vt. 296; *Bailey v. Lewis*, 3 Day (Conn.) 450. ² *Supreme Lodge v. Owens* (Ky.), 22 S. W. Rep. 326. ³ See § 108.

is taken, disposing of the fund, if no one dissents, are considered as voting with the majority for the motion, and assenting thereto. Their right to the fund is concluded; but it is otherwise as to those not present.¹ If it is so provided, the majority may control the minority by a vote, if such vote is for the purposes of the association, and within its provisions. Courts of chancery have power to see that societies are faithful trustees in the disposition of the fund, and will see that it is appropriated to the object designed, and will not suffer it to be diverted to another, unless with the consent of the contributors.

Where, under a resolution of the majority, the surplus fund has passed into the hands of new trustees, between whom and the original contributors there is no privity, such trustees are not accountable to them for the fund. Their remedy is against the original trustees only.² The supreme court of Kentucky interfered to require the funds raised by a fair, to be applied to the objects for which the fair was held, and to prevent self-constituted trustees from diverting such funds from those objects.³ Contributors to a fund creating a trust for religious or charitable purposes, can not, as such, call the trustees to an account for their disposition of the fund. They have no standing in court for such a purpose, unless they are trustees, or *cestuis que trustent*, or have some reversionary interest in the trust fund.⁴ An action for money had and received may be maintained by a member of an unincorporated voluntary society against the treasurer, to recover the amount of his contribution, where it appears that the latter has possession of the funds, and the purposes and objects for which the contributions were made can not be accomplished.⁵ Upon a bill in equity for the distribution of the funds of a mutual benefit society among the members, a decree of distribution will not be granted unless it is made clearly to appear that the operations of the society have entirely ceased, that there are no beneficiaries entitled to the funds, and that its objects have been abandoned,⁶ or that the by-law is so unreasonable as to

¹ See § 106.

⁵ Koehler v. Brown, 2 Daly 78.

² Abels v. McKeen, 18 N. J. Eq. 462.

⁶ Roper v. Burke, 83 Ala. 193; 3 So. Rep. 439; Kuhl v. Meyer, 42 Mo. App.

³ Morton v. Smith, 5 Bush (Ky.) 474. 467.

⁴ Ludlam v. Higbee, 11 N. J. Eq. 312.

be void. A society may not, by a change in its by-laws, arbitrarily repudiate an obligation created under them, but where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, a court will not inquire into the wisdom of the change so made.¹ A court of equity is slow to interfere with the internal regulations and mere police courts of a society incorporated for benevolent and charitable objects, and will not apply the harsh remedy of injunction, except in cases clearly made out by proof, and where all other remedies are exhausted. It will not restrain the officers of such a society from enforcing its by-laws, unless they are clearly so unreasonable as to be null and void.²

§ 128. **Rights of members in the property and funds of a society.**—Where the society is organized for purposes other than profit, there may be property belonging to it, derived from the payment of dues or fines, or consisting of the furniture of its rooms, but the possession of such property is a mere incident, and not the main purpose or object of the society. A member has no severable proprietary interest in it, and no right to any proportionable part of it, either during the continuance of his membership, or upon his withdrawal. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the society, while it continues to exist, like a pew, the ultimate and dominant property in which is in the corporation or congregation, and not in the pew-holder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets.³ The legal title to all of the personal property of an unincorporated society is vested in all of its members, just as the title to partnership property is vested in all the partners; but there is this difference, that a member of such a society, or his legal representative, has no right to call for an accounting and a division of the property. Upon the sale of land belonging to a voluntary society which is

¹ *Supreme Lodge v. Knight*, 117 Ind. 489; 20 N. East. Rep. 479; see 329; *In re St. James Club*, 13 Eng. § 25 *et seq.*; § 126. ³ *White v. Brownell*, 3 Daly (N. Y.) L. & Eq. 529.

² *Hussey v. Gallaher*, 61 Ga. 86; *Kerr on Injunctions*, Chap. 23, 24, 28; see § 126.

unincorporated, with no rules or provisions as to the disposition of its property, the members at the time of the sale are entitled to divide the proceeds in equal shares.¹ It is well settled that where members have, contrary to the constitution and government of a voluntary society to which they belonged, severed their connection therewith, they can not invoke the aid of a court of equity to take the property of the society from those who adhere to its organization, objects and government. A court of equity will not, at the instance of the minority, compel the majority of the owners of the furniture of an Odd Fellows' hall to purchase the interests of the minority therein, nor to remove and sell the same, and divide the proceeds among all the owners, where it appears that the furniture is being used for the very purposes for which it was originally purchased.² A court of equity has power to place the property of an unincorporated society in the hands of a receiver, order the same to be sold, and the proceeds divided among its members; but it will not exercise this power unless equity clearly requires it. A bill in equity praying for such relief, brought by a minority of the members against a majority, will be dismissed where the evidence fails to show that the property is being mismanaged or wasted.³ Where it is shown that the payment of salaries to the officers of a society seems to have been regulated rather by the condition of the expense fund in the treasury than by the compensation actually earned; where the system of paying so-called compensation is but a disguised scheme for a division of profits among its officers; where it appears that the affairs of the society have been operated for the profit of its officers, the courts will, upon application, interfere to protect the interests of the members.⁴ A society may expend money belonging to it in any measures calculated to promote the object of its organization, and a member has no right to interfere with such an expenditure.⁵

Where two benevolent societies, one of men and the other of women, having separate organizations but the same objects,

¹ *Brown v. Dale*, 25 Eng. Rep. (Moak) 776. ⁴ *State v. Association*, 42 Oh. St. 579; *McCarthy's Appeal*, 17 W. N. C. (Pa.)

² *Robbins v. Waldo Lodge*, 78 Me. 182, 565; 7 Atl. Rep. 540.

³ *Hinkley v. Blethen*, 78 Me. 221; 3 Atl. Rep. 655. ⁵ *Ingham v. Reform Club*, 12 Phila. 326; 34 Leg. Int. 132.

united in purchasing a cemetery, each society contributing a moiety of the purchase money, and for a time mutually participating in the use and profit of the property, although the title was taken to the officers of one of them, a subsequent going over of a majority of the members of the other society to that one will not deprive such other society of its rights of property resulting from the payment of half the price, and the same will be declared and enforced by decree of court.¹ Where certain members of Teutonia Lodge withdrew from the jurisdiction of the grand lodge of the state, surrendered their fraternal charter and formed a new lodge, adopting the same name, and other members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, that body which continued true to its allegiance and held the charter, was, as to certain property of the original lodge taken by the members who withdrew, adjudged to be Teutonia Lodge and, as such, to be entitled to the property of the society.² The seceding members of an incorporated society, forming a new society, can not maintain a suit for the recovery of debts due to the society from which they seceded.³ In cases of personal chattels, in which the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss, equity will interfere and grant full relief, by requiring a specific delivery of the thing which is wrongfully withheld. This may occur where the thing is of peculiar value, as being ancient, or the production of some distinguished artist, or a family relic or ornament. This rule has been held applicable to the personal property of societies; and where a highly ornamented silver tobacco box had been for many years handed down from a certain officer of the society to his successor, and a person retained possession of it after his term of office expired, and refused to deliver it to his successor in office, unless the society would pass his accounts, the court without measuring the value of the box, decreed that it be delivered up to the proper officer.⁴

¹ Ladies Benevolent Society v. Society, 3 Tenn. Ch. 100.

³ Smith v. Smith, 3 Desau. (S. C.) 557.

² Altman v. Benz, 27 N. J. Eq. 331; see also McFadden v. Murphy, 149 Mass. 341; 21 N. East. Rep. 868; Gorman v. O'Connor, 155 Pa. St. 239; 26 Atl. 379; see § 129.

⁴ Fells v. Read, 3 Ves. Jr. 70; Beasley v. Allyn, 12 W. N. C. 90.

A person who has been expelled from the "Society of Believers," commonly called Shakers, can not maintain an action for services rendered the society prior to such expulsion, or for his expenses of support since separation.¹ In a social partnership, where an absolute community of property with right of survivorship, on the one hand, and care by the community of every member through life, on the other, is the fundamental and pervading principle, if one member be unjustly expelled by an usurped, though unquestioned, authority, not having under the clear terms of the association any right to expel him, the court will not oblige him to return to the association, there not being on its part an offer of full and satisfactory reconciliation and reception, but will interfere with the fundamental and pervading principle; and though the expelled member brought nothing into the community, will give to him a separate and individual part of the property. And where payment for the party's services at the ordinary rate of services like his, during many years that he was a member, would give to him more than his numerical proportion or share of the whole capital stock, and where the question of profits was a little obscure, the court, regarding this as the simplest and most natural justice, gave to him his numerical share or proportion of the whole capital stock, from whatever source arising, as the same existed at the time he was expelled, irrespective of the amount which he found in the association when he became a member.²

§ 129. **Revocation of the social and fraternal charter of a subordinate by the supreme body.**—Where a subordinate lodge is incorporated under the laws of the state, its suspension by the grand lodge has no effect on its legal existence,

¹Grosvenor v. United Society, 118 Mass. 78; Waite v. Merrill, 4 Me. 102.

²Nachtrieb v. The Harmony Settlement, 3 Wall. Jr. 66. In a case brought by another complainant against these same defendants, there being imperfect evidence of any expulsion, and the defendants by their answer, "conceding the complainant's perfect right and liberty to return to the enjoyment of all the privileges, benefits and advantages contemplated by the association, he discharging the duties incumbent on him as a member of it," the court refused to grant the complainant any relief, but dismissed the bill with costs. Lemix v. The Harmony Society, 3 Wall. Jr. 87; Scriber v. Rapp, 5 Watts 351-360; see Burt v. Oneida Community, 16 N. Y. Supp. 289; 137 N. Y. 346.

and gives to the representatives of the grand lodge no right to the possession of the property of which it is the owner, and in which the grand lodge has no right, title or interest. A provision of the constitution of the grand lodge, that in case of failure by a subordinate lodge to do certain things, it "shall be deemed an extinct lodge, and its charter shall be forfeited," applies only to the fraternal existence and social charter of a subordinate lodge. If it be incorporated, its corporate existence can only be dissolved in the manner prescribed by the laws of the state.¹ The Independent Order of B'nai B'rith, organized for benevolent purposes, has numerous lodges in different states. The primary or subordinate lodges are grouped into districts, over which are district grand lodges composed of delegates elected by the subordinate lodges. Above these is a "Constitution Grand Lodge." There is also an appellate court for the settlement of controversies arising within the order. Among the general laws is one which requires each subordinate lodge to obey the ordinances, laws and resolutions of the "Constitution Grand Lodge," its district grand lodge, and the final decisions of the appellate court, under penalty of suspension and forfeiture of its charter. These charters are paper documents emanating from, and issued by the district grand lodges to the subordinate lodges within their respective territorial limits.

Jedidjah Lodge of Baltimore was within the limits of district No. 5, and received a charter from the grand lodge of that district. In December, 1853, Jedidjah Lodge was incorporated under the act of the Maryland legislature of 1852, and in February, 1870, District Grand Lodge No. 5, was incorporated under the general corporation law of Maryland of 1868. A bill was filed in July, 1884, by District Grand Lodge No. 5 against Jedidjah Lodge, alleging that the complainant had forfeited the charter of said Jedidjah Lodge under the laws and constitution of the order, and claiming that by reason thereof the funds of said Jedidjah Lodge belonged to the complainant. The supreme court of Maryland held that the charter granted by the state to the Jedidjah Lodge could not be forfeited by the grand lodge, whether acting in its conventional or corporate capacity, that the charter could be

¹ Merrill Lodge v. Ellsworth et al., 78 Cal. 166; 20 Pac. Rep. 399.

annulled by the legislature, or forfeited under such proceedings for that purpose as are authorized by statute or by the common law, and in no other mode, and by no other agency; that the Jedidjah Lodge held the funds in controversy, and had the right to hold them, under the corporate powers conferred by the state charter, and so held them entirely unaffected by the forfeiture of the documentary or conventional charter granted to it by the district grand lodge, by virtue of which forfeiture alone the complainants claimed such funds.¹

The terms of the laws of the supreme lodge or council of a society, providing that on suspension of one of the local organizations its property shall be forfeited and vest in the secretary of the supreme body, are void, in that they seek to confiscate, without judicial process, property held and owned absolutely by the local organization.²

§ 130. **Mutual benefit societies as charitable organizations.**—It was held by the Supreme Court of Ohio that a benefit society which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not “an institution of purely public charity,” and that its moneys held and invested for such purposes are not exempt from taxation.³ And in Iowa it is held that a building owned by a benefit society, and leased for pecuniary profit, is taxable, although built with a fund which was exempt, and into which the rents are paid. Its status as taxable property became fixed when it was used for business purposes and became productive.⁴ A mutual benefit society is a private, not a public charity.⁵ The distinctive characteristics of a pub-

¹ District Grand Lodge v. Jedidjah Lodge, 65 Md. 236; 3 Atl. Rep. 104; Goodman v. Jedidjah Lodge, 67 Md. 117; 9 Atl. Rep. 13. ⁴ Fort Des Moines Lodge I. O. O. F. v. The County of Polk, 56 Iowa 34; City of Indianapolis v. The Grand Master, etc., 25 Ind. 518; Morris v. Lone Star Chapter, 68 Texas 698.

² Wicks v. Monihan, 130 N. Y. 232; 29 N. East. Rep. 139; affirming 8 N. Y. Supp. 121; citing Austin v. Searling, 16 N. Y. 112; see Wells v. Monihan, 129 N. Y. 161; 29 N. East. Rep. 232. ⁵ Saltonstall v. Sanders, 11 Allen 456; Delaware Institute v. Delaware Co., 94 Pa. St. 163; see Bauer v. Samson Lodge, 102 Ind. 262; Miner v. Association, 63 Mich. 338; 29 N. W. Rep. 852; 6 West. Rep. 117; Burd Orphan Asylum v. School District, 90 Pa. St. 29.

³ Morning Star Lodge, I. O. O. F. v. Hayship, Treasurer, 23 Oh. St. 144; see Saltonstall v. Saunders, 11 Allen 453; Delaware Institute v. Delaware Co., 94 Pa. St. 163.

lic charity are that its funds are derived from gifts and devises, and not from fees, dues and assessments, and that it is not confined to privileged individuals, but is open to the indefinite public. A masonic lodge is not a charitable or benevolent institution within a statute providing that the property "of all benevolent, charitable and scientific institutions incorporated in this state" shall be exempt from taxation.¹

A masonic lodge is a charitable institution, and its property is exempt from taxation, under a section of the statutes providing that the property of charitable institutions, used for their legitimate purposes, shall be exempt from taxation.² In passing upon the question whether a masonic hall was exempt from taxation under a statute exempting "every building erected for the use of any benevolent or charitable institution," it was said by the supreme court of Indiana: "It is not essential to charity that it shall be universal. That an institution limits the dispensation of its blessings to one sex, or to the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not, we think, deprive it either in legal or popular apprehension of the character of a charitable institution. If that only be charity which relieves human want, without discriminating amongst those who need relief, then indeed it is a rarer virtue than has been supposed. And if one organization may confine itself to a sex, or church, or city, why not to a given confraternity? So narrow a definition of charity * * is not, that we are aware of, ever attached to it, and we are not at liberty to circumscribe the effect of the statute, and defeat its intention, by affixing to its terms an unusually limited meaning."³ The reserve fund of a mutual benefit society is subject to a taxation, and its contingent liability to holders of certificates is not such an indebtedness as may be deducted from the credits of the society subject to taxation.⁴

¹ Bangor v. Masonic Lodge, 73 Me. 428. to unincorporated associations, see authorities in Treasurer v. Atwater,

² Mayor v. Solomon's Lodge, 53 Ga. 93. 30 Oh. St. 77; Liggett v. Ladd, 17 Ore. 89; 21 Pac. Rep. 133.

³ City of Indianapolis v. The Grand Master, etc., 25 Ind. 518; Burdine v. Grand Lodge, 37 Ala. 478; Bequests ⁴ Kansas Mutual v. Hill, 50 Kans. 636.

CHAPTER IX.

JURISDICTION OF COURTS OVER SOCIETIES—PART III.

- § 131. Religious societies.
- 132. Ecclesiastical jurisdiction—Civil rights.
- 133. Secession in religious society—Division of property.
- 134. Property and trusts of religious societies.
- 135. Trustees and officers of religious societies.

§ 131. **Religious societies.**—It is not proposed to discuss at length in this work the subject of religious societies, but so many of the principles which govern the courts in their treatment of such societies are applicable to societies at large, that it is necessary to refer, at least, to the jurisdiction of courts over them. Churches in this country are, in a legal point of view, no more than other societies voluntarily organized by its citizens.

§ 132. **Ecclesiastical jurisdiction—Civil rights.**—Civil courts in this country have no ecclesiastical jurisdiction. They can not reverse or question ordinary acts of church discipline, and can only interfere in church controversies when civil rights, or rights of property are involved. When a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective denominations to which they belong. When a person becomes a member of a church he becomes such upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court, so long as

none of his civil rights are invaded.¹ While the courts will decide nothing affecting the ecclesiastical rights of a church, yet its civil rights to property are subjects for their examination, to be determined in conformity to the laws of the land, and the principles of equity.² The usage of a church, or the law of its organization as a religious society, if they are to be considered in deciding legal controversies, should be proved as facts.³

The testimony of those in authority in the church, such as a bishop of a diocese, is competent to define the meaning of terms and words, as used in the church, and to show the usages and customs of the church.⁴

Courts are frequently required to ascertain facts from history, but then they consult its authentic sources, and ascertain such facts from them, and not from the opinions of witnesses. The mere opinions of witnesses as to departures from the faith of a religious denomination, are not admissible as evidence.⁵

It is not the province of courts of justice to decide, or to inquire what system of religious faith is most consistent, or what religious doctrines are true, or what are false, in any case; and it seldom becomes necessary for courts to discuss, or to examine the creeds, or confessions or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders.⁶ Whether a person died in the faith of a church, so as to be entitled to interment in its cemetery, is not a question within the jurisdiction of the civil courts, but must be decided by the ecclesiastical authorities.⁷ Whether or not devotional singing, forming a part of the public worship of a particular religious society, should be accompanied by instrumental music, must be determined by those who administer

¹ Schweiker v. Husser, 146 Ill. 399; ⁴ Bird v. St. Mark's Church, 62 34 N. East. Rep. 1022; 44 Ill. App. Iowa 567; Ferrara v. Vasconcellos, 566; White Lick v. White Lick, 89 *supra*.
Ind. 136.

² Ferrara v. Vasconcellos, 31 Ill. 25; Prickett v. Wells (Mo.), 24 S. W. Rep. 52.

³ Vasconcellos v. Ferrara, 27 Ill. 781, 237; Hendrickson v. Decow, 1 N. J. Eq. 577.

⁵ Happy v. Morton, 33 Ill. 398.

⁶ Hale v. Everett, 53 N. H. 9.

⁷ McGuire v. Trustees of St. Patrick's Cathedral, 3 N. Y. Supplement

the discipline of the church to which they belong.¹ The decisions of ecclesiastical courts are final as to what constitutes an offense against the discipline of the church.

The civil courts will interfere with churches and religious associations, when rights of property or civil rights are involved, but they will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction.² Where the rector of a parish sued it for a balance due him on his salary under the canons of the diocese and his contract with the vestry, it was held that, by failure to pay him his full salary, a clear legal right had been invaded, and that it was the duty of the civil court to protect and enforce that right.³

A purely ecclesiastical office, such as that of a deacon in a church, an office not created or expressly authorized by state law, but created by an unincorporated ecclesiastical body, and filled by election by a body which possesses no corporate powers or functions, is not under the jurisdiction of a court of law, so as to be made subject to a *quo warranto* proceeding.⁴

¹ *Tartar v. Gibbs*, 24 Md. 323.

² *Watson v. Jones*, 80 U. S. 679; *Connelly v. Association*, 58 Conn. 552; 20 Atl. Rep. 671; *Chase v. Cheney*, 58 Ill. 509. In a dissenting opinion in *Chase v. Cheney*, it was said: "We concede that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject-matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is that the association is purely voluntary, and when a person joins it, he consents that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a spiritual

court unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and it is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable upon principle and authority." *Watson v. Avery*, 2 Bush (Ky.) 332; *Odd Fellows v. Hook*, 10 Cin. Law Bull. 391; *Nance v. Busby*, 91 Tenn. 303; 18 S. W. Rep. 874; *Brundage v. Deardorf*, 55 Fed. Rep. 839; *Bears v. Heasley* (Mich.), 57 N. W. Rep. 270.

³ *Bird v. St. Mark's Church*, 62 Iowa 568.

⁴ *Ter Vree v. Geerlings*, 55 Mich. 562; 22 N. W. Rep. 89.

Changes in matters of form in the conduct of the worship, or in the administration of the ordinances, not affecting the substance of doctrine or discipline, may be made by congregations, and determined by a majority of the members entitled to vote, in the absence of any other lawfully established rule.¹

§ 133. **Secession in religious society, division of property, etc.**—In the absence of proof to the contrary, it will be presumed that religious societies can not dissolve their connection with the principal organization without permission.² Where the usage of a church, or the law of its organization, gives the majority of the members of a congregation the right to withdraw from its ecclesiastical authority, neither the act of the majority in withdrawing, nor the act of the minority in adhering, works a forfeiture of the rights of either to the church property, because in neither case has an illegal act been done. Where such separation is permissible, all the members, those adhering to the former church connection as well as those seceding, are beneficiaries of the common property, and in case of a separation, the property should be divided between the two parties in proportion to their numbers at the time of the separation.³ But the rule is, that where a church is erected for the use of a particular denomination, or religious persuasion, a majority of the members of the church can not abandon the tenets and doctrine of the denomination and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if a single member adheres to the original faith and doctrine of the church. This rule is founded in reason and justice. Church property is rarely paid for by those alone who worship there, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship, or to promote the promulgation or teaching of particular doctrines or tenets of religion, which, in their estimation, tend most to the salvation of souls; and to pervert the property to another purpose is an injustice of the same character as the application of any trust property to purposes other than those designed by the donor. Hence it is, that those who adhere to the orig

¹ *Schradi v. Dornfeld*, 52 Minn. 465; 55 N. W. Rep. 49.

³ *Ferraria v. Vasconcellos*, 31 Ill. 25; *Smith v. Swormstedt*, 16 How.

² *Vasconcellos v. Ferraria*, 27 Ill. 237.

288; *Brooke v. Shacklett*, 13 Gratt. (Va.) 301.

inal tenets and doctrines, for the promulgation of which a church has been erected, are the sole beneficiaries designed by the donors; and those who depart from and abandon these tenets and doctrines cease to be beneficiaries, and forfeit all claim to the title and use of such property. These are the principles on which the decisions are founded.¹ Changes in the membership of religious congregations and bodies do not effect their legal identity; and for the purposes of continuing and enjoying the uses to which the properties respectively possessed by them are devoted, they respectively remain in legal contemplation, the same congregations and bodies.² The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws and principles which were accepted among them, before the dispute began, are the standard for determining which party is right.³

In 1881, testatrix devised property to the "board of trustees for the Protestant Episcopal Church in the diocese of North Carolina." At that time the diocese of North Carolina embraced the whole state. In 1883, it was divided into the diocese of North Carolina and the diocese of East Carolina. Testatrix died in 1885. Code N. C. § 3665, provides that an organized church can hold property by gift or otherwise, and that the estate therein shall vest absolutely in the trustees of said church. It was held that the devise being to the trustees for "the Church in the diocese of North Carolina," and not to the "diocese" as such, on the subdivision of the diocese in conformity to the usages of the church, without secession or schism, the property devised should be equally divided among the trustees of each diocese.⁴ Where a schism

¹ *Schradi v. Dornfeld*, 52 Minn. 465; *supra*; *Den v. Bolton*, 12 N. J. L. 206; 55 N. W. Rep. 49; *Ferraria v. Vasconcellos*, *supra*; *Winebrenner v. Colder*, 43 Pa. St. 244; *Baker et al. v. Fales*, 16 Mass. 488; *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Sawyer v. Baldwin*, 11 Pick. (Mass.) 495; *Skilton v. Webster*, *Brightly's Reps.* (Pa.) 203; *Dublin case*, 38 N. H. 459; *Lewis v. Watson*, 4 Bush (Ky.) 228; *Gibson v. Armstrong*, 7 B. Monroe (Ky.) 481, criticised in *Ferraria v. Vasconcellos*, 52 Minn. 465; 12 N. J. L. 206; 4 N. J. Eq. 77; *Methodist Ch. v. Wood*, 5 Ohio, 283; *Hadden v. Chorn*, 8 B. Mon. (Ky.) 70; *Deaderick v. Lampson*, 11 Heisk. (Tenn.) 523.

² *Mannix v. Purcell*, 46 Oh. St. 102; 19 N. East. Rep. 572.

³ *McGinnis v. Watson*, 41 Pa. St. 9.

⁴ *Diocese of East Carolina v. Diocese of North Carolina*, 102 N. C. 442; 9 S. E. Rep. 310.

occurs in an ecclesiastical organization, which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the control of the property belonging to the organization must be determined by the ecclesiastical laws, usages, customs, principles and practices which were accepted and adopted by the organization before the division took place. Where the local congregation, which is itself a member of a much larger and more important religious organization, and is under its government and control, divides into two separate and conflicting bodies, and one of these bodies, to the exclusion of the other, is recognized by the proper superior body as constituting the true congregation, the decision of the proper superior body in that respect, when established as a fact, is binding upon the civil courts as regards questions of property arising out of the division between such separate and conflicting bodies. In case of a division of a religious corporation, both parties still adhering to the tenets and discipline of the organization, their property should be divided between them, in proportion to their numbers at the time of such separation. In making partition of the property of a religious corporation, in case of division, mathematical nicety is neither attainable nor important. The only satisfactory mode is to count church members, by virtue of their membership, and, in addition, to count all pew holders, as members of the congregation.² While two parties in a congregation were trying to get possession of the church property, and their disputes were under the scrutiny of the synod of the church, the court directed each party alternately to have the weekly use of it.³ A seceding minority of a church, while in good faith in pos-

¹ *Lamb v. Cain*, 129 Ind. 486; 29 N. East. Rep. 13; *Nance v. Busby*, 91 Tenn. 303; 18 S. W. Rep. 874; *White Lick Quar. Meeting v. White Lick*, etc., 89 Ind. 136; *Watson v. Jones*, 80 U. S. 679; *Gaff v. Greer*, 88 Ind. 122. In these cases the authorities are reviewed at great length and among those which are cited upon the above and kindred propositions are the following: *Harrison v. Hoyle*, 24 Ohio St. 254; *Chase v. Cheney*, 58 Ill. 509; *Church v. Witherell*, 3

Paige 296; *Lawyer v. Chipperly*, 7 Paige 281; *Watkins v. Wilcox*, 66 N. Y. 654; *Church v. Seibert*, 3 Pa. St. 282; *Harmon v. Dreher*, 1 Speer's Eq. 87; *Smith v. Nelson*, 18 Vt. 511; *Bowden v. McLeod*, 1 Edw. Ch. (N. Y.) 588; *Roshi's Appeal*, 69 Pa. St. 462.

² *Niccolls v. Rugg*, 47 Ill. 47; *Hale v. Everett*, 53 N. H. 9.

³ *Bowden v. McLeod*, 1 Edw. Ch. (N. Y.) 588; see *Curd v. Wallace*, 7 Dana (Ky.) 190, where the court divided the use of the church.

session of the church building, placed repairs upon it which were necessary, and it was held that they had a good claim for the value of the improvements, which should be paid by the majority, as a condition to the exclusive use of the house by the latter.¹ An organized church can not be divested of its property, even though a majority of its members enter into a new organization which adopts the name of the original church, provided the old organization still exists.²

§ 134. **Property and trusts of religious societies.**—The rights of property and contract in religious organizations are under the protection of the law, and the actions of their members are subject to its restraints. Where a church is of a strictly congregational or independent organization, and the property held by it has no trust attached to it, its right to the use of the property must be determined by the ordinary principles which govern voluntary associations.³ A charitable bequest to an unincorporated religious society is not invalid by reason of its being composed, to a great extent, of persons not resident within the state. Nor is such bequest void, because given simply to an unincorporated association, and not for any specified charitable use.⁴ The majority in a religious association, not incorporated, have supreme control and direction of the use of the church property, as respects all matters not determined by the articles of association of the particular society, the organization and discipline of the denomination to which it belongs, or the trust under which the property may have been conveyed; and the minority can not, by procuring a charter of incorporation, acquire the right to the management of

¹ Hadden v. Chorn, 8 B. Monroe (Ky.) 70.

² Venable v. Coffman, 2 W. Va. 310; Harper v. Straus, 14 B. Mon. (Ky.) 48; see Smith v. Pedigo (Ind.), 33 N. East. Rep. 777.

³ Watson v. Jones, 80 U. S. 679.

⁴ Evangelical Ass'n Appeal, 35 Pa. St. 316; Banks v. Phelan, 4 Barb. (N. Y.) 80.

A will giving testator's wife the use of land for life, and devising it to a religious society by the words, "At the death of my wife, I give and de-

vise," etc., provided that the land should be used as a parsonage by the society, and that, when the society should cease to use it as such, it should revert to testator's heirs. *Held*, that the devise did not vest until the death of testator's wife, and that the society, having been incorporated during her life, was competent to take under it, though not incorporated at the time of testator's death. Longhead v. Church, 129 N. Y. 211; 29 N. East. Rep. 249; 12 N. Y. Supp. 207.

the property in opposition to the will of the majority of those interested.¹ Where a religious society purchases land, and the title vests in it in fee, as a corporation, the majority of the society has a right to control its use and occupation. They can not be deprived of this right by any supposed error of doctrine. It is incident to the very nature of such corporation to hold such property at the will of a majority, if the charter of incorporation does not otherwise provide. They may occupy and manage such property as they please, so long as they admit the minority to the same benefits as themselves.²

Individuals may dedicate property, by way of trust, to the purpose of sustaining and propagating definite religious doctrines, and it is the duty of the court to see that the property so dedicated is not diverted from such trust. It is not in the power of the majority of a congregation to carry the property so confided to them to the support of a new and conflicting doctrine.³

Where a fund is bequeathed to an ecclesiastical society, the interest of which is to be applied for the purpose of maintaining a free school in one of the districts, an agreement by the society to apply the fund to the support of the ministry is a fraud on third persons, and void.⁴

A court of equity will not interfere to prevent the misuse or abuse of a trust of a religious nature, unless there is a real and substantial departure from the purposes of the trust, which amounts to a perversion of it.⁵ A complaint for the recovery of real estate, stating in substance that plaintiffs are members of a certain religious society and sue for the benefit of themselves and all other members; that the society is in full membership with a certain national church, and was organized to teach the gospel according to the rules, discipline, and doctrine of that church; that the society was incorporated; that it purchased the property in question to be used as a parsonage, with funds contributed by its members and others; and that the defendants, who were members also, procured the

¹ *Henry v. Dietrich*, 84 Pa. St. 286; *White Lick v. White Lick*, 89 Ind. Mason v. Finch, 28 Mich. 282. 136.

² *Keyser v. Stausifer*, 6 Oh. 363; ⁴ *Bailey v. Lewis*, 3 Day (Conn.) Calkins v. Cheney, 92 Ill. 463; see 450.
§ 15.

⁵ *Happy v. Morton*, 33 Ill. 398.

³ *Watson v. Jones*, 80 U. S. 679;

name of the corporation to be changed for fraudulent purposes, and diverted the property from its intended use, avers a good cause of action. An allegation that the plaintiffs accepted one doctrinal standard and the defendants another, is sufficiently definite, though it does not show the difference between the two confessions of faith.¹

Where a number of persons contribute to the erection of a church edifice upon the agreement that it is to be used by a certain religious society, and, when not in use by it, by other denominations, and for "lectures, concerts," etc., it is not necessary for all the persons contributing to the erection of the building to join in an action to restrain a sale of the property for mercantile purposes. Where a church edifice has been erected by voluntary contributions, and upon the promise and agreement that the building is to be used for certain specified purposes, the contributors have a right to insist that the property be used for the purposes named, and may enjoin a sale of the building, where no adequate cause therefor is shown, and the effect would be to divert the funds from the use intended, and apply them elsewhere.² An eleemosynary charity is, in the general scope of its benevolence, essentially unsectarian, and can only be made sectarian by having such limitations and restrictions placed upon it by the donor as make it so. The mere making of an ecclesiastical organization the trustee for an ordinary eleemosynary charity does not of itself give a sectarian character to the charity, and if no limitations or restrictions are imposed to the contrary, the ecclesiastical body may continue in possession of the charity as its trustee so long as it continues to be essentially and characteristically the same organization, without reference to changes or modifications which it may make in matters of mere detail, or of relatively subordinate importance, connected with its faith, doctrine and practices.³

When a society, of a particular religious sect or denomination, is formed with a strictly sectarian or denominational name

¹ *Baker v. Ducker*, 79 Cal. 365; 21 136; *Attorney General v. Moore*, 19 Pac. Rep. 764. N. J. Eq. 503; *Watkins v. Wilcox*, 66

² *Avery v. Baker*, 27 Neb. 388; 43 N. Y. 654; *Presbyterian Congregation v. Johnston*, 1 Watts & Ser. 9. N. W. Rep. 174.

³ *White Lick v. White Lick*, 89 Ind.

descriptive of the fundamental doctrines of the sect to which it belongs, the presumption is that it was constituted for the purpose of promoting the vital and fundamental doctrines of such sect or denomination. In such cases, where a conveyance is made to, or a trust created for the benefit or use of such religious society, by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support, the denominational name may be a sufficient guide as to the nature of the trust, so far as respects doctrines which are admitted to be fundamental. And in such case, those having control of property held in trust for the benefit of such religious society may be restrained from applying the property, or the use of it, to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination at the time, and immediately after, such trust was created.¹ Where the original trustees, appointed by the founders of a religious charity or trust, applied the fund to the support of certain religious doctrines, and that application has been long continued, and has always been acquiesced in by the founders of the charity or trust, a court of equity will not permit such application to be changed or interfered with, unless such change is clearly required by the plainly expressed intention of the donor.² The religious tenets of a donor in trust to a religious corporation may be shown, as well as other circumstances, to aid in the construction of ambiguous provisions.³

§ 135. **Trustees and officers of religious societies.**—There is one principle common to the trustees of all incorporated churches. They have the possession and custody of the temporalities of the church. They are considered, *virtute officii*, entitled to the possession, and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by the pastor,

¹ Hale v. Everett, 53 N. H. 9.

² Hale v. Everett, *supra*.

³ Kniskern v. Church, 1 Sand. Ch. (N. Y.) 439.

members of the congregation or by strangers.¹ A court of chancery has jurisdiction to compel the persons having charge of the temporalities of a church, incorporated or otherwise, to the faithful performance of their trust, and also to prevent the diversion of the property from its original purpose.² A court has jurisdiction to compel the trustees of a church, who have violated their trust by appropriating the funds to the propagation of doctrines differing from the legitimate doctrines of the church, to deliver up the church property to other trustees of the church, who will properly apply them, and who have been duly elected by those entitled to elect trustees.³ A court of equity will entertain jurisdiction to compel the trustees of a church to permit clergymen who adhere to the principles of the church, to minister to the congregation in the church edifice, without regard to the comparative numbers of the respective parties in the congregation.⁴ Whenever the trustees of a religious society organized under the general law concerning its incorporation, do any act which obstructs the enjoyment of the property for the purposes and in the mode authorized by the usages of the church as an organized body, they are guilty of a violation of that trust, which will be corrected by a court of chancery. A trust of this character is not distinguishable, in this, from any other trust over which courts of chancery exercise a supervisory power.⁵ Trustees are seized for the use of the body; and each member of the church becomes entitled to a beneficial interest in the property of the church, so long as his or her connection or membership continues. All the members of the body become beneficiaries in such property in an equal degree, notwithstanding some of them may have contributed a larger sum than others toward the common property.⁶ Aliens may be trustees and incorporators in a religious corporation.⁷ The court has no authority to control the discretion of the trustees of a church in the

¹ *German Congregation v. Presler*, 17 La. Ann. 127.

⁵ *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Ferraria v. Vasconcellos*, 31 Ill. 25.

² *Bowden v. McLeod*, 1 Edwards Ch. (N. Y.) 588; *Wilson v. Island Church*, 2 Rich. (S. C.) Eq. 192.

⁶ *Brunnenmeyer v. Buhre*, *supra*; *Ferraria v. Vasconcellos*, *supra*.

⁷ *Cammeyer v. Church*, 2 Sand. Ch.

³ *Gable v. Miller*, 10 Paige (N. Y.) 627; *Watson v. Jones*, 80 U. S. 679.

⁴ *Skilton v. Webster, Brightley's Repts.* (Pa.) 203.

management of its funds, so long as they do not violate their charter; they are responsible to their constituents alone.¹ A majority of the members of the church can not control the action of the trustees, in regard to its property, against the usage and rules of the organization.² Where the trustees of a church corporation executed a mortgage on a church property to secure a legitimate debt, it was held that there was no equity in refusing to enforce the mortgage, under color of protecting a charitable use.³

¹ Wardens v. Barksdale, 1 Strobh. Sutter v. Trustees, 6 Wright (Pa.) (S. C.) Eq. 197. 510.

² Brunnenmeyer v. Buhre, *supra*; ³ Magie v. Church, 13 N. J. Eq. 77. People v. Steele, 2 Barb. (N. Y.) 397;

PART II.

THE LAW OF MUTUAL BENEFIT INSURANCE.

THE LAW OF MUTUAL BENEFIT INSURANCE.

CHAPTER X.

CERTIFICATE OF MEMBERSHIP.

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142. Delay of society in accepting application.

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156. Suicide.

157. Known violation of law.

§ 136. **Generally.**—An ordinary life insurance policy contains the whole contract of insurance,¹ but the certificate of membership in a mutual benefit society is only a part of the written evidence of the contract. In such a society, the charter, constitution and by-laws in force at the time of the admission of the member are terms of an executory contract to which he assents when he enters it, and are, therefore, a part of the contract of insurance, whether they are referred to in the certificate of membership, or not.² In some societies,

¹ *Union Mutual v. Mowry*, 96 U. S. 544; *buque Mutual*, 18 Iowa, 322; *Davidson v. Old People's Mutual*, 39 Minn. 303; 39 N. W. Rep. 803; *Hellenberg*, 71 Ala. 436; *Sineral v. Du-*

² *Supreme Commandery v. Ains-* 303; 39 N. W. Rep. 803; *Hellenberg*, 71 Ala. 436; *Sineral v. Du-* v. I. O. O. B., 94 N. Y. 589; *Masonic*

the issue of certificates of membership, as a part of the contract of insurance, is not contemplated. The charter, constitution and by-laws of such societies are made to contain the whole plan of insurance, designating who shall be the beneficiaries of its members, fixing the amount of the benefit fund, and setting forth the terms of the entire contract.¹ In such cases, membership in the society carries with it a specified amount of life insurance. The certificate of membership is, in any event, a mere fragment of the contract, and it may be said, without much extravagance of expression, that whatever vitality it possesses is derived from the charter, constitution and by-laws of the society. The contract of mutual benefit insurance is usually between the society and the member, and not between the society and the beneficiary. In such case, the charter, constitution and by-laws with regard to the classes of persons who may take the fund on the death of the member, and the interests and amounts which they shall take, may be changed from time to time, with the consent of the member, so as to limit, abridge or annul the prospective interest of the person designated as the beneficiary; and such changes are not subject to objection as impairing vested rights, or the obligation of contracts.² Where the constitution declares that the by-laws may be amended at any time, a designated beneficiary can not complain that a by-law in force when the certificate was issued, providing that the member might surrender the certificate with the consent of the beneficiary, and receive a new one, was amended so as to omit the requirement of his consent. A beneficiary has no vested rights in such a certificate, not being a party to the contract, and he can not recover on the original certificate when it has been surrendered and a new one issued.³ Certificates of membership usually provide for the payment

Mutual v. Burkhart, 110 Ind. 192; ¹Baldwin v. Fraternity, 47 N. J. Supreme Council v. Smith, 45 N. J. Law, 111; Dolan v. Court of Good Lq. 466; 17 Atl. Rep. 770; Supreme Samaritan, 128 Mass. 437; Grand Lodge v. Nairn, 60 Mich. 44; Van Lodge v. Elsner, 26 Mo. App. 108; Bibber v. Van Bibber, 82 Ky. 350; McClure v. Johnson, 56 Iowa 620. Splann v. Chew, 60 Texas 535; Miller ²§§ 211, 212, 213. v. Assurance Co., 42 N. J. Eq. 459; ³Byrne v. Casey, 70 Texas, 247; 7 Atl. Rep. 895; Railway Association 8 S. W. Rep. 38; Catholic Knights v. Robinson, 147 Ill. 138. Franke, 137 Ill. 118.

of the benefit fund, on condition that the member shall have complied with the constitution and by-laws of the society up to the time of his death. The constitution and by-laws referred to in such a provision are those in force at the time of the issuing of the certificate, and the society has no right, by amending or repealing any of them, without his assent, to impose any new conditions affecting the contract to his injury, or, by a new provision, passed after the making of the contract, to forfeit his rights under it. The rights of the members stand entirely free from such control. In a contract of mutual benefit insurance the member acts for himself, and not as a part of the society; his rights rest upon his contract of insurance, not upon his contract of membership in the society. A corporator in a mutual benefit society, like a stranger, may enter into a contract of insurance with it, and his rights under the contract will be as fully protected as those of a stranger.¹ The provisions of the charter, constitution and by-laws, so far as they relate to this contract, can not be altered so as to affect it, without the consent of the assured member.² But an amendment to the by-laws made merely for the purpose of regulating the mode of transacting its business, adding no new condition to, and subtracting nothing from the contract of insurance already issued by the society, is binding on him.³ Where there is nothing in the original contract, which, in terms or by implication, authorizes any change in its provisions or conditions, by-laws subsequently passed, do not become a part of that contract.⁴ Of course, he may consent that they shall

¹ See § 6; Insurance Co. v. Connor, 17 Pa. St. (5 Harris) 136; Willcuts v. N. W. Mutual, 81 Ind. 300; New England Mutual, etc., v. Butler, 34 Me. 451; Middlesex, etc., Co., v. Swan, 10 Mass. 384; Protection Life v. Foote, 79 Ill. 361; N. W. Ben. Assn. v. Wanner, 24 Ill. App. 357.

² See §§ 16 to 19; Morrison v. Ins. Co., 59 Wis. 162; 18 N. W. Rep. 13; Gundlach v. Association, 49 How. Pr. 190; Pulford v. Fire Department, 31 Mich. 458; Becker v. Farmers Mutual, 48 Mich. 610; 12 N. W. Rep. 874; Bradfield v. Union Mutual, 9 Weekly Notes of Cases (Pa.) 436; Hy-singer v. Supreme Lodge, 42 Mo.

App. 627; Eastman v. Provident Mutual (N. H.), 20 Cent. Law J. 266; Schunk v. Fond, 44 Wis. 375; Holland v. Taylor, 111 Ind. 121; Bauer v. Samson Lodge, 102 Ind. 262; N. W. Association v. Wanner, 24 Ill. App. 357; Richmond v. Johnson, 28 Minn. 449; Grand Lodge v. Sater, 44 Mo. App. 445.

³ Georgia Masonic v. Gibson, 52 Ga. 640; Walsh v. Ins. Co., 30 Iowa 145; Treadway v. Hamilton, 29 Conn. 68.

⁴ §§ 25 to 28; Hobbs v. Association, 82 Iowa 107; 47 N. W. Rep. 983; Courtney v. Association (Iowa), 53 N. W. Rep. 238.

modify it, but in that case they become effective by reason of his consent, not by reason of their enactment. It will be presumed that an amendment to the by-laws was not intended to affect a contract of insurance previously issued by the society, and it will be so construed as to give it a retroactive force only where the intention to have it so operate is clear and undoubted.¹

§ 137. While members are presumed to know, and to contract with reference to existing by-laws only; while a society has no power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligations of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations, still, members may contract with societies with reference to laws of future enactment, and may agree to be bound and affected by future laws, as they are bound and affected by those then in existence; and they may consent that laws of future enactment shall enter into, and form a part of their contracts, modifying or varying them. Where a contract of insurance is issued, conditioned that it shall be subject to such by-laws as may be enacted by the society, by-laws subsequently passed become a part of the contract. Where, for instance, the contract provided no forfeiture, if the member should die by his own hand, but provided that any violation of the "requirements of the law now in force, or hereafter enacted, governing the order, or this class, shall render this certificate null and void," and that the obligation of the society should depend upon the member's "full compliance with all the laws of the order now in force, or that may hereafter be enacted;" where the certificate was accepted by the member in writing, "subject to the laws of the order now in force, or which may hereafter be enacted by the supreme commandery," it was held that, by force of these stipulations and provisions, a by-law, enacted by the society after the certificate was issued and accepted, providing that a certificate of this class should be forfeited if the member, whether sane or insane, should take his own life, entered into and formed a part of the certificate, avoiding it in the event that the member, whether sane or insane, should take his own life.² A person accepting directly,

¹ § 27.

worth, 71 Ala. 436; see *Borgards v.*

² *Supreme Commandery v. Ainsworth*, 71 Mich. 440; 44 N. W. Rep.

or by assignment from the assured member, a certificate in a mutual benefit society, declaring that its constitution and by-laws are a part of the contract, is bound by them. He is not justified in supposing that, because each of the conditions annexed to the certificate refers to a by-law, the by-laws contain no further conditions.¹

§ 138. **When the contract is complete; delivery of certificate.**—The application for insurance is a mere proposal which the society is at liberty to accept or decline. When the society by some act of its proper officers accepts it, the minds of the parties meet and the contract is made. But it is evident that the insurer may accept it conditionally, upon such terms as it may see fit to impose, and, in such case, the last act required by the acceptance to be done, must be done, before the negotiations ripen into a contract. If the application is accepted, subject to the payment of a membership fee or an assessment, the payment must be made before the contract is complete, and upon such payment or the tender of it, within a reasonable or the stipulated time, the contract is in force. A contract of insurance may be valid before actual delivery of the policy. Where the minds of the contracting parties have met upon a distinct proposition made by the one and accepted by the other, chancery will decree its execution, and where the minds of the parties have thus met, an agent may not refuse to deliver a policy on account of the changed condition in health of the assured.² Thus, when an application is sent through the local agent to the home office, and the company accepts it, and sends a policy to the agent for delivery to the applicant, it is the duty of the agent, unless it is otherwise agreed between the parties, or he is otherwise instructed by the company, to deliver the policy, upon tender of the premium, even though the applicant may have become dangerously ill.³ It is the duty of an applicant for insurance to communicate to the society any material change in his

856; *Korn v. Society*, 6 Cranch 192; *tucky Mutual v. Jenks*, 5 Ind. 96; *Hutchinson v. Supreme Tent*, 22 N. Crittenden v. Ins. Co., 41 Mich. 442; *Y. Supp.* 801; see §§ 26, 27. *Schwartz v. Ins. Co.*, 21 Minn. 215;

¹ *Miller v. Association*, 42 N. J. Eq. 18 Minn. 449; *Yonge v. Society*, 30 459; 7 Atl. Rep. 895. *Fed. Rep.* 902; *Hallock v. Ins. Co.*, 26

² *Fried v. Ins. Co.*, 50 N. Y. 243; *N. J. Law* (2 Dutcher) 268-278.

Cooper v. Ins. Co., 7 Nev. 116; *Ken-* ³ *Schwartz v. Ins. Co.*, *supra*.

health, in the interval between the making of the application and the acceptance of it,¹ and where the certificate is delivered and an assessment or membership fee is accepted in ignorance of the fact that there has been a material change in the health of the applicant, the contract is null and void.² But if the minds of the parties have met, though the certificate has not been issued and the entrance fee or assessments have not been paid, it is immaterial that there has been a change in the health of the applicant since the acceptance of the application.³

The insurer may transmit its certificate to its local agent with instructions, general or special, and may direct him to deliver it to the applicant, upon certain payments, provided the latter is in good health when the payments are made. In such case, the ill health of the applicant is a good excuse for the refusal of the agent to make the delivery. The constitution of a society provided that upon examination of an applicant, and approval of the application by the supreme lodge, and the signing of the certificate of membership, and the forwarding of it to the subordinate lodge, the contract should be complete. A certificate was forwarded to the subordinate lodge and retained by it on the ground of fraud in the application. While the lodge held the certificate the member died. There was no evidence of fraud in the application made to the society, and it was held that the beneficiary might recover on the certificate without producing it in evidence.⁴ A supreme lodge executed a certificate of membership and sent it to a subordinate lodge to be countersigned by the subordinate lodge, as required by the by-laws, and delivered to the member. It was not countersigned or delivered to the member, but was in the custody of the subordinate lodge when the member died. The question for the court to decide was, whether the certificate was so far perfected, in accordance with the laws of the order, as to entitle the beneficiary to recover the fund. The court

¹Whiting v. Ins. Co., 129 Mass. Ch. 132; Piedmont Ins. Co. v. Ewing, 240; Whitley v. Ins. Co., 71 N. C. 92 U. S. 377.

480; Piedmont Ins. Co. v. Ewing, 29 ³Franklin Ins. Co. v. Colt, 20 Wall. U. S. 377; Ins. Co. v. Higginbotham, 560; Day v. Ins. Co., 1 McArthur 95 U. S. 380. 598.

²Canning v. Farquar, 16 L. R. Q. ⁴Lorcher v. Supreme Lodge, 72 B. D. 727; Whitley v. Ins. Co., *supra*; Mich. 316; 40 N. W. Rep. 545. British Equitable v. Ins. Co., 38 L. J.

said: "It is manifest that the only object of the countersigning would be to show that the certificate had reached the member by the regular channel. It was not intended and could not give additional force to the agreement of the supreme lodge to pay the money. It imposed no obligation or duty upon the subordinate lodge, nor did it in any way indicate the direction or want of direction on the part of (the member). It was nothing more than the performance of a duty required by a principal from his agent, to show that the agent had performed a ministerial act. * * * Upon what principle should an accident which prevented countersigning and actual delivery to (the member) relieve the supreme lodge from the performance of their contract? Delivery to an agent for delivery to a party in interest is a completed delivery from the time the agent has received the instrument. The principal can not take advantage of the failure of the agent to perform an act over which the party having the beneficial interest has no control."

A member of a local council in California sent his application for insurance to the supreme court of American Legion of Honor at Boston, Mass. The application was returned to the local council for correction of a clerical irregularity in the certificate of the medical examiner. The irregularity was corrected, and the application again sent to the supreme council. It was never received at the office of the supreme council, and no certificate was ever issued to the member. The secretary of the local council wrote several times to the secretary of the supreme council, making inquiries about the application, but received no answer. The member soon afterward died. From the time of sending on his application, he was treated as a beneficiary member by the local council, and was called on to pay assessments as other beneficiary members. He paid three assessments, all that were levied, and the money was forwarded to the supreme secretary. The money was received without objection, and no notification was ever given that he was not considered a beneficiary member by the supreme council until after his death.

A by-law of this society provided: "Applicants will not be subject to assessments or entitled to benefits until their exami-

¹ Supreme Lodge v. Martin, 12 Ins. L. Jour. (Phil. Com. Pleas.) 628.

nations are approved, but will become beneficiary members on the day of the approval by the medical examiner in chief, and they must be credited with their assessments on the date of approval, as above." The superior court of San Francisco, in deciding the case, said: "The certificate is not the contract. It is only the evidence of it. The medical examiner in chief has no right to arbitrarily reject an application made in good faith, and after compliance with the requirements of defendant. He has no power to change the by-laws. He is merely an executive officer, authorized to see that applicants are qualified. In this case it is conceded that the applicant was qualified in every respect. It was the duty of the examiner in chief to approve the application. 'That which ought to have been done is to be regarded as done, in favor of him to whom and against him from whom performance is due.' This is a favorite maxim of the law."¹ While an acceptance of the application must be signified by some act of the society, there can be no rule laid down defining just what act or acts will constitute such an acceptance. The facts and circumstances of each case must be considered in order to determine whether there has been any act or outward expression indicating that the minds of the parties have met upon the proposition made by the applicant.²

Where a society accepted the payment of assessments with knowledge of the fact that no formal application for membership had been made by the person paying them and that no examination had been made, as required by its laws, it was estopped to dispute his membership.³ When a contract of insurance has been completed and sent by mail, a recovery may be had thereon though it does not reach the destination until after the death of the insured.⁴ A certificate of membership is void as a policy of insurance if executed by the society after the death of the member and in ignorance of that fact.⁵

¹ *Oliver v. Am. L. of Honor*, 10 P. C. L. Journal 481; *Am. L. Rev.*, 1883, p. 301. ³ *Burlington Relief v. White* (Neb.), 59 N. W. Rep. 747.

² *Diboll v. Ins. Co.*, 32 La. Ann. 179; *Gay v. Ins. Co.*, 51 Mich. 245; *Fried v. Ins. Co.*, 50 N. Y. 243; *Faughner v. Ins. Co.*, 86 Mich. 536; 49 N. W. Rep. 643. ⁴ *Dailey v. Preferred Masonic* (Mich.), 57 N. W. Rep. 184.

⁵ *Giddings v. N. W. Mutual, etc.*, 102 U. S. 108; *Insurance Co. v. Ewing*, 92 U. S. 377; *Insurance Co. v. Young*, 90 U. S. 152; *Markey v. Ins.*

§ 139. An application for insurance, or an offer to insure, sent by mail, is a continuing proposition which may be accepted by the other party within a reasonable time, before notice of withdrawal; and where the party to whom the proposition is made unqualifiedly accepts it by letter, the contract becomes complete on the mailing of the letter of acceptance.¹ In such case the contract is complete without manual delivery of the policy. The unconditional acceptance of an application, and the transmission of a proper policy to an agent for delivery without instructions, are equivalent to a delivery to the member.² Where a person made application for insurance, and the application set out that the policy would not take effect until the membership fee was paid, but the agent of the society told the applicant that he could pay the fee either at that time, or when the policy was delivered, and the applicant elected to pay at the latter time, but died before the policy was received, it was held that the policy never took effect, and the insurer was not liable.³

Deceased applied for membership in a subordinate lodge of the Knights of Honor, his proposition fee being paid. The medical examiner recommended him for membership. All forms were complied with, and he was elected a member by the lodge, but died two days later, without having been initiated. The laws of the order required an applicant, within a certain time after his election, to present himself for initiation, or forfeit his election, and the benefit certificate from the

Co., 103 Mass. 92; *Ins. Co. v. Kennedy*, 6 Bush. 450; *Ins. Co. v. Willets*, 24 Mich. 268; *Misselhorn v. Mutual Reserve, etc.*, 30 Fed. Rep. 545; *Rogers v. Ins. Co.*, 41 Conn. 97; *McClave v. Association*, 55 N. J. L. 1-7.

¹ *Taylor v. Ins. Co.*, 50 U. S. (9 How.) 390; *Hamilton v. Ins. Co.*, 5 Barr. (Pa.) 339; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Northampton Ins. Co. v. Tuttle*, 40 N. J. L. 103; 39 N. J. L. 486; *Alabama, etc., Ins. Co. v. Heron*, 56 Miss. 643; *Hallock v. Ins. Co.*, 26 N. J. L. 278; *Shattuck v. Ins. Co.*, 24 Cliff. 598; *Sheldon v. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565; *N. E. Ins. Co. v. Robinson*, 25 Ind. 536.

² *Whitaker v. Ins. Co.*, 29 Barb. (N. Y.) 312; *Southern Ins. Co. v. Kempton*, 56 Ga. 339; *New England, etc., Co. v. Robinson*, 25 Ind. 537; *Insurance Co. v. Colt*, 20 Wall. 560; *Cooper v. Ins. Co.*, 7 Nev. 122; *Heiman v. Ins. Co.*, 17 Minn. 153.

³ *Ormond v. Life Association*, 96 N. C. 158; 1 S. E. Rep. 796; *Weinfeld v. Association*, 53 Fed. Rep. 208; *Kohen v. Association*, 28 Fed. Rep. 705; *Wood v. Ins. Co.*, 32 N. Y. 619; *Baker v. Ins. Co.*, 43 N. Y. 284; *Misselhorn v. Association*, 30 Fed. Rep. 545; *Giddings v. Ins. Co.*, 102 U. S. 110.

supreme lodge was to be issued only on application from the subordinate lodge, after the applicant had received his degree. The application contained an agreement that the payment of the proposition fee or the entertaining of the application, unless the applicant should be duly elected "and initiated," should not constitute membership, or give any rights of a member. It was only on the death of a "member who has obtained the degree of the subordinate lodge" that the supreme lodge could order payment to the beneficiary. It was held that deceased was not a member of the lodge. The constitution and by-laws requiring an applicant for membership to be initiated in addition to paying his proposition fee and being elected, before acquiring any rights as a member, are reasonable, and not contrary to law, notwithstanding the ceremony of initiation is secret.¹ Where the application states that the certificate shall not be in force until it is actually delivered to the applicant, no binding contract is made until the certificate is delivered. Where a certificate states on its face, that it shall not be binding until it is delivered to the member while in good health, it does not become binding by delivery to the beneficiary after the death of the member.² Where the contract provided that it should not become effective until the first assessment levied after its execution had been paid by the member, and the society neglected to give him notice of the next assessment levied by it, and he died eighteen days after it had been levied, it was held that the society could not, to defeat the contract, rely on its failure to levy the assessment on him by proper notice.³

§ 140. It may be laid down as the settled law in fire insurance that a contract of insurance is complete when the insurer offers to insure on certain terms, and the offer is accepted by the applicant, and that the contract need not be in writing unless the law expressly requires it.⁴ These principles

¹ *Matkin v. Supreme Lodge*, 82 Ins. Co., 11 Paige Ch. 547; *Walker v. Texas* 301; 18 S. W. Rep. 306.

² *McClave v. Association*, 55 N. J. L. Co., 94 U. S. 621. There are at least 187; 26 Atl. Rep. 78. five essential elements in a contract of insurance, viz.: the subject-matter;

³ *Globe Ins. Co. v. Duffy*, 76 Md. 293; 25 Atl. Rep. 227. the risks insured against; the amount

⁴ *May on Insurance*, § 14-24; *Ins. Co. v. Colt*, 20 Wall. 569; *Sanford v.* insured; the duration of the risk, and the premium of insurance; and a con-

have been held to apply in mutual benefit societies, in cases where the charter and by-laws contain the whole contract of insurance, and where there is no provision that the contract must be in writing.¹ When an accepted applicant for membership pays his membership fee, and promises in his written application to pay the further sum of one dollar and ten cents whenever any other member dies, or forfeit his claim to a benefit; and the by-laws provide that the association, within thirty days after satisfactory proof of his death, will pay to his widow as many dollars, not exceeding one thousand, as there are surviving members at the time of the death, the contract is completed, and is one of life insurance. Where a certificate stipulates that it shall not be in force until countersigned by an agent, or an officer of a subordinate lodge, it is invalid until so countersigned, unless this requirement is waived by the society.²

§ 141. **Where executed.**—Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, and if valid or void there, it is valid or void everywhere.³ In *Reimsdyk v. Kane et al.*,⁴ Judge Story says the rule is well settled “that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract” unless it shall appear from its tenor that it was entered into with a view to the laws of some other state.⁵ Huberus, in his *De Conflictu Legum*,⁶ says: “The general rule is that contracts are to be interpreted according to the laws of the country where they are made, but if, from the terms or nature of the contract, it appears it was to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial, and the obligation must be tested by the

tract deficient in any of these is incomplete. *Tyler v. Ins. Co.*, 4 Robt. 151. *Continental Ins. Co. v. Webb*, 54 Ala. 688; *Hardie v. Ins. Co.*, 26 La. Ann. 242; *Badger v. Ins. Co.*, 103 Mass. 244; see

¹ *Oliver v. Am. L. of Honor*, 10 Pac. Coast Journal 481; *Cooper v. Ins. Co.*, 7 Nev. 121; *Sheldon v. Ins. Co.*, 25 Conn. 219; *Alabama Ins. Co. v. Mayes*, 61 Ala. 163; *Rhodes v. Ins. Co.*, 5 Lans. 71.

² *Pral v. Society*, 63 N. Y. 608; *McCully v. Ins. Co.*, 18 W. Va. 782; *Con-*

Norton v. Ins. Co., 36 Conn. 503; *Myers v. Ins. Co.*, 27 Pa. St. 268; *Paine v. Ins. Co.*, 51 Fed. Rep. 689.

³ There are a few exceptions to this rule.

⁴ 1 Gallison, 374.

⁵ *Fitch v. Remer*, 1 Biss. 337.

⁶ Vol. 2, book 1, tit. 3.

laws of the country where the duty was to be performed." A policy issued from the office of a society in Wisconsin was held to have been executed in Oregon, because the policy required that it should be countersigned by the agent in Oregon, before it should be valid and binding.¹ In *Hyde v. Goodnow*,² under the provisions of the application and policy, which contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors, it was held that when the application was approved and the policy deposited in the mail at the place of the company's office, addressed to the defendant, the contract was then and there executed, and became binding on the parties thereto.³ The transmission of a policy by mail to the applicant or to an agent for delivery to an applicant, is the completion of the contract at the place where this act is performed. A policy which does not become a binding contract until its delivery, is governed by the laws of the state in which it was delivered to the insured by an agent of the company, although it was executed and dated at the office of the company in another state.⁴

§ 142. **Delay of society in accepting an application for insurance and issuing a certificate.**—As has been heretofore said,⁵ societies may decide for themselves whom they will admit as members, and they may also determine whether or not they will enter into contractual relations with one who applies for insurance. An applicant may have all the necessary qualifications prescribed for membership in a society, and may perform all the acts required to be performed in order to entitle him to admission and insurance, and yet be rejected.

¹ *N. W. Mutual v. Elliot et al.*, 5 Fed. Rep. 902; *North Hampton Ins. Co. v. Tuttle*, 40 N. J. Law, 103; 39 Fed. Rep. 225; see also *Pomeroy v. Insurance Co.*, 40 Ill. 400; *Thwing v. Insurance Co.*, 111 Mass. 109; *Hardie v. Insurance Co.*, 26 La. Ann. 242; 33: 46 N. W. Rep. 891; *Pace v. Insurance Co. v. Kennedy*, 6 Bush. 19 Fla. 438; *Pomeroy v. Ins. Co.*, 40 Ill. 398. 108; *Continental Ins. Co. v. Webb*, 54 Ala. 688; *Wall v. Society*, 32 Fed. Rep. 273; *Voorheis v. Ass'n*, 91 Mich. 469; 51 N. W. Rep. 1109.

² 3 N. Y. 269.

⁴ *Knights Templar v. Berry*, 50 Fed. Rep. 511; *Assurance Society v. Clements*, 140 U. S. 226; 11 S. Ct. Rep. 822.

⁵ §§ 29, 30.

³ See *Yonge v. Equitable Life*, 30

And since he has no legal claim upon the society until he is accepted as a member and an insured person, mere delay in passing upon his application will give him no rights and afford no presumption of its acceptance. In one case it was said: ¹ "While receipt of the application may cast a moral duty upon the company to act promptly, yet delay does not operate in the same way as an acceptance of the application. Suppose the company had delayed acting for a year, could it be claimed that the policy was in force? The proposition which the applicant made was for a policy to become operative when the instrument was executed and delivered. No negligence, no delay, reasonable or unreasonable, on the part of the insurance company, could make a contract in face of the stipulation."² And in another case it was said: "We are not aware of any authority for the proposition that mere delay, mere inaction, can amount to an acceptance of a proposal to enter into a contract. The opposite is the true doctrine, that if no answer is given to a proposition for a contract, within a reasonable time, the proposition is regarded as withdrawn. The principle is stated in *Hallock v. Conn. Ins. Co.*³ 'A contract arises when an overt act is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not, and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time.' If the appellant was dilatory in acting on the proposal, the deceased could have quickened its diligence by demanding prompt action; or, if not assenting to the delay, he could have retracted his proposal, and reclaimed the money he had advanced and his note. He had no right, without an inquiry as to the cause, without any action on his part, to rely on the supineness of the appellant, no greater than his own, as an acceptance of the proposal."⁴

¹ *Misselhorn v. Mutual Reserve, etc.*, 61 Ala. 163; see *Otterbein v. Ins. Co.*, 30 Fed. Rep. 545. 57 Iowa 274; *Harp v. Ins. Co.*, 49 Md.

² See *Kohen v. Mutual Reserve*, 28 307; *Ins. Co. v. Johnson*, 23 Pa. St. Fed. Rep. 705; *Supreme Lodge v.* 72; *Bentley v. Ins. Co.*, 17 N. Y. 421; *Grace*, 60 Texas 569. *Flanders on Insurance*, 108; *Titus*

³ 26 N. J. L. 268; 27 N. J. L. 645; *v. Ins. Co.*, 81 N. Y. 410; *Ins. Co. v.* 72 Am. Dec. 379. *Beatty*, 119 Pa. St. 6; 12 Atl. Rep. 607.

⁴ *Alabama, etc., Ins. Co. v. Mayes*,

In holding that an acceptance of the proposition for insurance is not to be presumed merely from the lapse of about six months without a reply to the proposition, another court said: ¹ "What is the true effect of the delay? It can not of itself make a contract. A proposal can not become a contract by delay in rejecting or answering it. * * A neglect or delay that has properly a tendency to mislead another, and which is incompatible with honesty, may be charged as a ground of liability; as where one knows that another is acting as his agent in a particular matter without or beyond his authority, and does not promptly disavow his acts. But in this case the plaintiffs had in their own hands the power of correcting the delay; for undue delay in accepting a proposal may be and ought to be treated as a rejection of it, and the proposer may refuse to be bound by a tardy acceptance. A proposal not answered remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to it with reasonable diligence." When there is anything left open for future adjustment, either as to the amount or duration of the risk, or the consideration to be paid, negotiations are incomplete, and no contract or obligation exists.² Where an application is never received,³ or never acted upon, there can be no contract.⁴ Possibly a society may, under some circumstances, be liable for neglect of its agent to forward an application for insurance within a reasonable time, but however that may be, it is certain that it is not liable on a contract of insurance, but only in an action based upon such negligence.⁵

§ 143. **Construction of the contract.**—The provisions of a life insurance policy are construed and applied like the terms of any other contract:⁶ but, where they are vague, ambiguous,

¹ Insurance Co. v. Johnson, 23 Pa. Texas 569; Armstrong v. Ins. Co., 61 Iowa 212; 16 N. W. Rep. 94; Win-

² Haskins v. Ins. Co., 78 Va. 700— nesheik Ins. Co. v. Holzgrafe, 53 707; Haden v. Association, 80 Va. Ill. 516.

683. ⁵ Walker v. Ins. Co., 51 Iowa 679;

³ Atkinson v. Ins. Co., 71 Iowa 340; 2 N. W. Rep. 583.

32 N. W. Rep. 371.

⁶ Conn. Mutual v. Pyle, 44 Oh. St. 19; 4 N. East. Rep. 465.

⁴ Markey v. Ins. Co., 103 Mass. 78— 92; Supreme Lodge v. Grace, 60

inconsistent or uncertain in their meaning, that interpretation will be given to them which is in favor of the insured. This rule is placed upon the ground that limitations upon the force of the principal obligation of the contract, inserted by the insurer in his own words, for his own benefit, must be clearly and unequivocally expressed. Where, in a certificate of membership, there are two inconsistent stipulations covering the same subject-matter, the one general and providing, among other things, that upon certain conditions, the policy shall become absolutely void, and the other separate and distinct, and providing, upon the very same conditions, that the society may, by proper steps, avoid the policy, the latter stipulation will govern. Thus, a specific stipulation in a separate clause of a certificate of membership, providing that if the assured shall become intemperate to a certain degree, the society may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture.¹ When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he can not, after an acceptance by the other contracting party, set up the narrow construction.² Only a stern legal necessity will induce such a construction as will nullify the contract of insurance.³

A policy of life insurance, while not an evidence of debt for the absolute payment of money, is a chose in action governed by the principles applicable to other agreements involving pecuniary obligations.⁴ Certificates of membership in mutual benefit societies are, in effect, policies of life insurance, and in most respects, are governed by the same rules which prevail in policies of insurance.⁵ The certificate and by-laws of a society should be construed liberally, with a view to effectuate

¹ *N. W. Mutual v. Hazelett*, 105 Ind. 212; 4 N. East. Rep. 582; 55 Am. Rep. 192. *National Bank v. Ins. Co.*, 95 U. S. 673; *Niagara Ins. Co. v. Scammon*, 100 Ill. 644.

² *Burkhard v. Ins. Co.*, 102 Pa. St. 262; *Breasted v. Farmers' Co.*, 4 Seld. 299; *Moulou v. Ins. Co.*, 111 U. S. 335. ³ *Franklin Life v. Wallace*, 93 Ind. 7; *Bliss on Life Ins.*, § 385.

⁴ *Hutson v. Merrifield*, 51 Ind. 24. ⁵ *Hoffman v. Ins. Co.*, 32 N. Y. 412; *Symonds v. Ins. Co.*, 23 Minn. 491; 98 Ind. 149. *Supreme Lodge v. Abbott*, 82 Ind. 1;

the contract and to carry out the object of its organization.¹ The stipulations of a written contract are not the less binding because made between a corporation and one of its members; nor are the rules of construction in such cases different from those which obtain in contracts between corporations and strangers. It has been frequently held that where parties have, by their own acts, placed a construction upon doubtful and ambiguous provisions of a contract of insurance, the courts will carry that construction into effect. But the construction given to any of the provisions of the contract of insurance by the officers of the society is not binding upon the courts, and the members can not be bound by any acts which may have been done by them under such a construction.² In *Wiggin v. Knights of Pythias*, *supra*, the court said: "These words of the by-laws become part of the contracts for life insurance, and in the courts must receive the ordinary interpretation put upon the contracts containing them. * * These benevolent associations or fraternities, not more than other parties to contracts, can not be allowed to construe the words they use in making agreements otherwise than according to their plain and unambiguous meaning in the English language they employ, whether the words of the contract itself or of the rules and regulations which become, by the principles they insist on, embodied in the contract as a part of it. They can not be permitted to interpret the contract as they please, and become their own judges of what they mean by the use of the words employed that have either a technical or well-defined signification, known of all men who use the language. Legislatures and parliaments can not do that, and even they are bound by the common meaning of the words they use in their statutes which become part of a contract." The opinion of an officer of a society, as to the interpretation to be given to its laws, is not admissible in evidence, in absence of evidence that he was under its laws, a judicatory for the purpose of making such interpretation.³ The law governing the distribution of the

¹ *Erdmann v. Mutual, etc.*, 44 Wis. 376; *Covenant Mutual v. Sears*, 114 Ill. 108; *American Legion v. Perry*, 140 Mass. 580; *Elsev v. Association*, 142 Mass. 224; *Ballou v. Gile*, 50 Wis. 614; *Splawn v. Chew*, 60 Texas 532.

² *Manson v. Grand Lodge*, 30 Minn. 509; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; see § 145. ³ *Davidson v. Supreme Lodge*, 22 Mo. App. 263.

benefit fund is to be found in the constitution, by-laws and certificates of the society, but when a dispute arises as to the interpretation of that law, the law of the domicile, and not that of the place where the property may chance to be, governs such interpretation.

§ 144. Where in the body of a certificate of membership, reference is made to the indorsements, they may be considered in connection with the policy, in determining when the certificate is payable, where that is left doubtful in the body of the instrument. Where such a certificate was indorsed: "Mutual assurance on the life of——— Due at the death of members \$1," and the body of the certificate contained expressions such as, "should the assured come to his death by the hands of the law" or "should die by suicide, or without heirs or assigns" only \$50 should be paid, it was held that, taking into consideration these expressions, with the indorsements, the intention was manifest that the policy was to become due on the death of the assured.¹ The by-laws of a benefit association provided that, upon the death of a member, and in order to make up the amount to be paid to his beneficiary, each member should pay one dollar, and that the beneficiary should be entitled to receive from the association the amount collected on the assessment levied therefor. In construing these by-laws, the court held that the beneficiary was only entitled to receive the amount actually collected on an assessment made for his benefit, and not a sum equal to one dollar from each member.² In construing the following clause in a certificate of membership: "P. N., having complied with the conditions of membership, is entitled to the benefit of said association, in the sum of one dollar for each contributing member," the court held that "contributing members," and members in good and regular standing who had not forfeited their membership, were synonymous and convertible terms.³

¹ St. Clair Co. Ben. Soc. v. Fietsam, 66 Md. 240; Farmers' Mutual v. Snyder, 97 Ill. 474; see Hygum v. Aetna Ins. Co., 11 Iowa 21; Wright v. Mutual Benefit Association, 43 Hun (N. Y.) 61. The indorsement was held

not to be a part of the policy in Adm'r's of Stone v. Casualty Co., 34 N. J. L. 371; see Bassell v. Ins. Co., 2 Hughes 531; Planter's Ins. Co. v. Rowland,

² *In re* La Solidarite Mut. Ben. Ass'n, 68 Cal. 392.

³ Neskern v. N. W. Ass'n, 30 Minn. 406.

A provision in a certificate that "no question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named," embraces the defense of fraud of the insured and beneficiary in obtaining the certificate.¹ Provisions of the constitution and by-laws of a society, allowing benefits "in case of sickness," and providing that when "any member takes sick," he shall be entitled to benefits, "if it be so that he is not able to attend to his daily labor," do not extend to a case of permanent bodily injury, which does not affect the general health of the person injured.² A member of such a society had his thigh bone broken, which caused a shortening of the leg and the eversion of the foot. For twenty-six weeks the society paid him his allowance of \$5 per week, and at the expiration of that time, to wit, on October 8, 1877, refused to pay him any further weekly allowances. For about sixteen months he was able to do very little work, and could not perform the duties of a coachman, as he had done for years prior to his injury. On February 11, 1879, he brought suit for weekly benefits from October 8, 1877. The court held that he was not entitled to weekly benefits under the constitution and by-laws, as the incapacity to work, because of the effect of the injury, was not a sickness within their meaning.³ Insanity has always been regarded as a disease, and comes strictly within the meaning of the term "sickness." Where, therefore, by the laws of a society, benefits are promised on account of sickness, a member who has become insane is entitled to sick benefits.⁴

A certificate provided for the payment of five hundred dollars on the death of the member, and printed under this agreement was the following: "One-fourth only of the above sum payable if death occur after three calendar months and within six calendar months, from date; one-half only of the above sum payable if death occur after six calendar months and within one year; and the full amount only if death occur after

¹ Wright v. Association, 118 N. Y. 287; 23 N. E. Rep. 186; affirming 43 Hun 61.

² Kelley v. A. O. H., 9 Daly 289.

³ Kelley v. A. O. H., *supra*.

⁴ McCullough v. Association, 123 Pa. St. 142; 19 Atl. Rep. 355; Pellazzinio v. Society, 16 Cin. Law Bull. 27; Burton v. Eyden, L. R., 8 Q. B. 295.

one year, except in case of consumption, when but one-half the amount which would otherwise be due would be payable if death occur during the first year. No benefits will be due or payable if death occur within three calendar months from date." A member whose life was insured May 4, 1885, died July 2, 1885. In a suit on the policy the court said: "It is contended on the part of the plaintiff that the policy is for \$500 and that that amount is not qualified by the provision quoted, and in the second place that the provision is repugnant to the main body of the policy. It is quite true that the policy is for \$500, but it is equally true that the \$500 written in the policy precedes and is in connection with the conditions to the effect that one-fourth only is payable if death occur after three months and within six months, and that no benefits will be due or payable if death occur within three months. These provisions are clear and distinct and are not ambiguous in meaning, and the court has no power to strike them out or to separate them from the other provisions of the contract, and then compel the parties to execute it, for by doing so it would be making a contract for the parties different from that which they had made for themselves. Nor do we understand these provisions to be repugnant to or inconsistent with the other provisions of the policy."¹ Where the by-laws of a society provide funeral benefits for such deceased members only as were entitled to sick benefits, and deny sick benefits to members thirteen weeks in arrear, when taken sick, a member who is thirteen weeks in arrear when taken sick can not acquire, by payment of arrears, a right to a funeral benefit, although claiming no sick benefit.² In a society there were two kinds of benefits, sick benefits payable to the member and mortuary benefits payable to the beneficiary of the contract of insurance. A by-law provided that when a member had been delinquent for three months and was restored to membership by paying his past dues, he should "not be entitled to benefits for one month thereafter." The word "benefits," it was held, referred to sick benefits and not to those payable at his death to the beneficiary of his insurance.³ Where the by-laws provide

¹ Bruton v. Ins. Co., 48 Hun 204.

³ Connelly v. Society, 43 Mo. App.

² Frey v. Fidelity Lodge, 6 Pa. St. 283; Weiss v. Tennant, 21 N. Y. Supp. 435. 252.

that default in making payments during illness shall not work a forfeiture, and default is made during the last illness of a member, his beneficiary may recover.¹ Provisions in the by-laws that a person obtaining membership by false statements as to his age shall be expelled and forfeit all benefits, relate to proceedings which may be taken during his lifetime, and do not prevent the beneficiary from recovering after his death.² As the contract of mutual benefit insurance is between the society and the member, it would seem at first impression that a minor might not be admitted into membership and its contractual relations, unless the organic law of the society expressly authorized minors to become members. But such a contract, in the absence of express stipulations to the contrary, is purely unilateral, binding upon the society so long as the member performs the prescribed conditions, but not enforceable against him;³ and if the statute under which the society is organized is silent on the subject, a minor may be admitted to membership.⁴

§ 145. **Construction given to the terms of the contract by the society.**—A society can not, because the insured is one of its members, assume the right to construe the terms of its contract with him, but those terms as construed by the courts of the land, must determine the rights and duties of the parties to the contract. A decision of the officers of a society respecting the construction to be given to certain terms of a contract, and a custom which has arisen under such decision, are not binding on members.⁵ But where the officers of a society assume to construe certain provisions of the contract, and publish among its members a decision giving to them a construction more favorable to the members than courts would have given, courts will hold the society to the construction given by its officers on the ground that it is a declaration against its interests, and on the ground of estoppel. Where

¹ Grand Lodge v. Brand, 29 Neb. Globe Mutual, 135 N. Y. 280; 32 N. 644; 46 N. W. Rep. 95. East. Rep. 122, where it is held that a

² Supreme Council v. Boyle (Ind. App.), 37 N. East. Rep. 1105. minor may not become a member.

³ §§ 248, 249. ⁵ Manson v. Grand Lodge, 30 Minn. 509; Wiggin v. Knights, 31 Fed. Rep.

⁴ Chicago Mutual v. Hunt, 127 Ill. 122; Davidson v. Supreme Lodge, 22 257; 20 N. East. Rep. 55. This case Mo. App. 263; see § 143. is quoted from at § 119. See *In re*

the supreme body of a society, which is its legislative and judicial authority, publishes from its journal, for the information and guidance of its members, a decision holding that a certain contract of insurance was not forfeited for non-payment of certain dues and assessments, it is estopped to deny that the decision is of binding force in other similar cases. The decision must be held to prevent a forfeiture in a similar and subsequent case on the ground that it was a public and solemn declaration of the society, which would lead a member honestly to believe that he was complying with all the requirements necessary to keep his certificate in force, thus operating by way of estoppel. In such a case, the decision is a rule, established by competent authority, of equal validity with the terms of the constitution or by-laws, which it construes or modifies.'

§ 146. **Construction of application and certificate—Variance.**—The general rule as to policies of life insurance is that when a policy expressly designates the person who is to receive the insurance money, it is conclusive upon that subject. In mutual benefit insurance this simple rule may be modified and complicated in various ways. The member whose life is insured by a society may attempt to assign his certificate or to change his beneficiary, and these subjects will be treated of later. He may have designated in his application for insurance certain persons or a class of persons to receive the benefit fund, and the contract of insurance issued to him may not have followed accurately the direction given in his application. It is this variance between the direction as to the beneficiary given by the member in his application and the designation of the beneficiary in the certificate issued to him which will now be discussed. One aspect of the question is that the application for insurance must be viewed as any other proposition to enter into a contract. If it is accepted as made, the minds of the parties have met. If the certificate does not name the beneficiary or beneficiaries just as they are stated in the application, the member need not accept it; but if he accepts it and acts upon it, it will be presumed that he acquiesced in the change as made in the certificate and waived the

¹ Supreme Lodge v. Kalinski, 57 Fed. Rep. 348.

direction given in the application. A widower, with four children, applied for insurance, and in his application directed that his certificate be made payable to the children, naming them. The certificate issued to him was made payable at his death "to his children." He afterward married, and died leaving another child by his last wife. It was held that his five children were the proper beneficiaries under the contract.¹ A member who had been twice married, and had children by each wife, directed in his application that the fund should be payable to his second "wife, and her children," but the certificate issued to him provided that the fund should be payable to "his wife (J. E. S.) and children, his heirs." The court held that the certificate controlled and that the fund belonged to the wife and all the children of the member.² An applicant for insurance directed that his policy be made payable to his wife, "for herself and children," but he took, without objection, a policy designating as his beneficiary his wife, "her personal representatives and assigns," and regularly paid the premiums. It was held that the policy modified the application, and that the beneficiaries under the policy were entitled to the fund.³

If it be held that the acceptance of a certificate by a member shows that he waived any variance between it and his application in the designation of his beneficiary, a plain and simple rule is laid down for determining the rights of the parties under the contract.

But the presumption that the certificate states correctly the beneficiary of the insurance, is met by the well settled rule that the certificate and application must be construed together, and that the language of the application may limit and control the terms of the certificate. This rule of construction is an element of great uncertainty in the law, and no one can tell how it will be applied in a particular case until the court of last resort has passed upon it. By a clause of a certificate the application was expressly made a part of the contract. In the application there was the question, "For whose benefit is this contract made? (give relationship of beneficiaries, and

¹ Thomas v. Leake, 67 Texas 469; 3 S. W. Rep. 703; see § 187.

³ Hunter v. Scott, 108 N. C. 213; 12 S. E. Rep. 1027; see Carraher v.

² Grand Lodge v. Sater, 44 Mo. App. Ins. Co., 11 N. Y. St. Reporter, 665. 445.

full name)," and the answer, "myself." The law permitted the insurance to be made for the benefit of any one who had an insurable interest in the life of the member. The fund was paid to the executor of the deceased member, and was claimed by him as a part of the general estate, and by the heirs of the decedent. The claim of the heirs was founded upon the words of the certificate in the printed blank, where the society agreed to pay "to the executors or administrators of said member, in trust, however, for, and to be forthwith paid over to his heirs at law." In passing upon the proper construction to be given to the contract the court said: "The chief purpose of this language is to state the undertaking of the corporation, and that is fully accomplished before the words 'in trust' are reached. The final clause is a statement of the existence of a trust which is supposed to have been created by the designation of the insured in his application. In the present case these words are in direct conflict with the statement of ownership in the written portion of the contract, and it seems likely that they were inadvertently left in the printed blank. In the absence of anything else to show an intention to make his heirs beneficiaries, we are of opinion that the words referring to a trust must yield to the language of the application, and that the proceeds of the policy must be administered as a part of the estate of the insured, under his will."¹ A member in his application to be transferred to another class in the order, named his wife, or, in case of her death, his son, as beneficiary. By a provision in the certificate issued thereon, the application was made a part of the contract between the member and the society.² The certificate, as issued, only contained the name of his wife as beneficiary. It was held that the application controlled, and that, upon the death of the wife, the son became the beneficiary. The fact that the member accepted and kept the certificate without objection, did not imply that he assented to the designation of his wife alone as his beneficiary. Mere

¹ *Harding v. Littlehale*, 150 Mass. 100; 22 N. East. Rep. 703; see *Addison v. Association*, 144 Mass. 591; 12 N. East. Rep. 407. tificate does not refer to the application. *N. W. Association v. Bloom*, 21 Ill. App. 159; *Stacy v. Randall*, 17 Ill. 467; *N. W. Association v. Hand*,

² The application and certificate are one instrument even though the cer- 29 Ill. App. 73.

silence on his part is not enough to set aside the designation expressly made by him in the contract.¹

§ 147. **When the terms of a certificate are inconsistent with the terms of a by-law.**—It is, undoubtedly, the general rule that a member of a society must take notice of, and is bound by its articles of association and by-laws, although they are not recited or referred to in his certificate of membership.² But where the terms of a by-law and the terms of a certificate, while consistent with the charter, are inconsistent with each other, it must be held that the society has waived the provisions of the by-law in favor of the assured, and wherein they are inconsistent with the provisions of the certificate, the latter will control the rights and liabilities of the parties. A certificate provided that any member who had forfeited his contract of insurance might be again restored, at any time within six months, by furnishing proofs, of good health, and paying the full amount of arrears. A by-law provided that, if the death of the member should occur within sixty days from and after the date of reinstatement, the society should be liable to the beneficiary only for the amount actually paid to the society by the member on assessments. According to the terms of the certificate, the beneficiary was entitled to \$1,500, but, under the by-law, to only \$168.78, the member having died within sixty days after date of his reinstatement. The court affirmed a judgment for \$1,500.³ A provision in a certificate, evidently contemplating a mortuary assessment to meet each death loss, will prevail over a clause of the by-laws, tending to limit the number and amount of the assessments to be levied, and inconsistent with the provision, even though the by-laws, are, by the terms of the certificate, a part of the contract.⁴ A certificate stated that the beneficiary would be entitled to receive the proceeds of one full assessment, upon the death of the member. Afterward, by a by-law, the society provided that beneficiaries should only receive five-sixths of that amount. Subsequent to this amendment of the by-laws the member died, and the court held that the beneficiary was entitled to receive the proceeds of one full assessment.⁵

¹ Eckler v. Terry, 95 Mich. 123; 54 N. W. Rep. 704.

⁴ Fitzgerald v. Equitable Reserve, 3 N. Y. Supp. 214.

² See § 136.

⁵ Stowell v. American Association,

³ Davidson v. Old People's Soc., 39 Minn. 303; 39 N. W. Rep. 803.

23 N. Y. St. Rep. 706; see § 97. Merwin, J., dissenting. The court gave

§ 148. **By whom certificates must be signed.**—Certificates of membership in mutual benefit societies are usually issued by the central or governing body which is incorporated under the laws of some state. They must be signed by the administrative officers of the corporation, such as the president and secretary, with the corporate seal. It is, of course, competent for these certificates to provide that they shall not be in force until signed by the officers of the subordinate lodge to which the member belongs, but unless such a provision is contained in the contract of insurance, it is not necessary for the officers of such lodge to sign them.¹

§ 149. **Delivery of certificate to beneficiary not necessary.**—When a member of a society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named. The claim of the beneficiary, in such a case, is not based on a contract, but upon the appointment and direction for the payment of the fund.

Where the benefit certificate of a member was made payable at his death to such person as he should direct on the face of the certificate, and the member on the face of the certificate, directed that the benefit fund should be paid to a certain person, and retained possession of the certificate until his death, it was held that the beneficiary so designated took the fund by appointment, and that no delivery of the certificate in the lifetime of the member was necessary.²

§ 150. **The contract must be accepted by the beneficiary in its entirety.**—A person asserting a claim under a contract of insurance, is charged with notice of its contents, and must

no reasons for its decision, and it does not appear, from the opinion in the case, whether the member consented that the change in the by-law should affect his contract of insurance. See *Durian v. Central Verein*, 7 Daly 168 at § 136; see §§ 26, 97.

¹ *Fisk v. Equitable Aid Union*, 116 Pa. St. (not reported); 11 Atl. Rep. 84; 9 Cent. Rep. 403. When the contract so provides, the certificate must be

countersigned. *Prall v. Society*, 5 Daly, 298; 63 N. Y. 608; *Noyes v. Ins. Co.*, 1 Mo. App. 584; *Continental Ins. Co. v. Webb*, 54 Ala. 688; *Hardie v. Ins. Co.*, 26 La. Ann. 242; *Badger v. Ins. Co.*, 103 Mass. 244; but see *Norton v. Ins. Co.*, 36 Conn. 503; *Myers v. Ins. Co.*, 27 Pa. St. 268; *Kautrener v. Ins. Co.*, 5 Mo. App. 581.

² *Highland v. Highland*, 109 Ill. 366; 13 Ill. App. 510; see § 173.

accept the contract as a whole. He may not claim benefits under it, and repudiate a part of it. Where a husband had a certificate for one thousand dollars, payable to his wife, and afterward, for the purpose of increasing his insurance to three thousand dollars, took a certificate for that amount which showed upon its face that it was taken to increase his former insurance to that amount and not to secure three thousand dollars of additional insurance, it was held that as soon as she asserted a claim under the second certificate she became charged with notice of its contents, and by accepting its benefits consented that it should have the intended effect.¹ The beneficiary can not be heard to assert, in an action to recover the amount of the certificate, that the provision in the certificate that death must happen within ninety days after the accident is not authorized by defendant's constitution. She can not thus accept one part of the contract and reject another.² But this rule applies only to such provisions as are legal, for a beneficiary may urge that a particular clause in the contract is against public policy, against the statute law of the state, or contrary to the express provisions of the charter of the society.³

§ 151. **Certificates are valued policies of insurance.**—Contracts of fire and marine insurance indemnify against a pecuniary loss and their terms are to pay whatever is lost, not exceeding a specified amount. In this respect they differ from life insurance contracts. A contract of fire or marine insurance is called an indemnifying policy, while a contract of life insurance is called a valued policy. The latter is an agreement to pay a certain definite sum on the happening of a particular event which may or may not occasion a pecuniary loss. It does not estimate the value of the subject insured merely, but it values the loss, and is equivalent to an adjustment of the loss and an assessment of damages at a certain specified sum.⁴ A certificate of membership in a mutual

¹ *Wheeler v. Odd Fellows' Ass'n*, 10 Abb. N. C. 252; *Austin v. Searing*, 44 Minn. 513; 47 N. W. Rep. 149. 16 N. Y. 112-123; *Strasser v. Staats*,

² *Palmer v. Commercial Travelers' Mut. Acc. Ass'n*, 6 N. Y. S. 870. 13 N. Y. Supp. 167; *Greene v. Walton*, 13 N. Y. Supp. 147.

³ *Bauer v. Sampson Lodge*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133; *Poultney v. Bachman*, 104 Ind. 133; *Chisholm v. Ins. Co.*, 52 Mo. 213, 215; 14 Am. Rep. 414; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 372;

benefit society falls within this definition, and is a valued policy. It takes no note of the pecuniary value of the subject insured, and agrees to pay a certain sum, or one which may be rendered certain, on the happening of a certain event. The fact that the exact sum which will be paid on the certificate is uncertain, and is dependent upon the amount which may be derived from an assessment on the members of the society, does not change the character of the contract.¹ Every policy or certificate of insurance, however, is not to be regarded as valued, so as to entitle the beneficiary to the sum named in it at all events. Where a debtor insures his life for the benefit of his creditor, the contract is one of indemnity.

§ 152. **Reformation of certificate—Mistake.**—A court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments, and in making such corrections it will be governed by the same principles which control in the correction of ordinary contracts. It will be presumed that the contract as written expresses the will of the parties, and to justify the court in changing its language and reforming it on the ground of mistake, it must be established, that both parties agreed to something different from what is expressed in the writing. The proof upon this point should be so clear and convincing as to leave no room for doubt.²

Miller v. Ins. Co., 2 E. D. Smith (N. Y.) 268.

¹ Rockhold v. Benevolent Society, 129 Ill. 440; 21 N. East. Rep. 794.

² Harrison v. Ins. Co., 30 Fed. Rep. 862; Mead v. Ins. Co., 64 N. Y. 455; Tesson v. Ins. Co., 40 Mo. 33; Guernsey v. Ins. Co., 17 Minn. 104; Fritzler v. Robinson, 70 Iowa 500; 31 N. W. Rep. 61; James v. Cutler, 54 Wis. 172; 10 N. W. Rep. 147; St. Anthony Co. v. Merriman, 35 Minn. 42; 27 N. W. Rep. 199; Rawson v. Lyons, 23 Fed. Rep. 107; Griswold v. Hazard, 26 Fed. Rep. 135; Ahlborn v. Wolff, 118 Pa. St. 242; 11 Atl. Rep. 799; Cummins v. Monteith, 61 Iowa 541; 16 N. W. Rep. 591; Nelson v. Davis, 40 Ind. 366; 1 Story's Eq., Sec. 155;

Maher v. Ins. Co., 67 N. Y. 283; Clark v. Roots, 50 Ark. 179; 6 S. W.

Rep. 728; Frederick v. Henderson, 94 Mo. 98; 7 S. W. Rep. 186; Rous-

seau v. Lambert (Ky.), 7 S. W. Rep. 102 Pa. St. 17; Cooper v. Ins. Co., 50

Pa. St. 299; 88 Am. Dec. 544; National Ins. Co. v. Crane, 16 Md.

260; Bartholomew v. Ins. Co., 34 Hun 263; Durham v. Ins. Co., 22

Fed. Rep. 468; Thompson, Receiver, v. Ins. Co., 136 U. S. 287; 10 Sup. Ct.

Rep. 1019. Relief will not be denied, simply because there is a conflict in

the evidence upon the question of a mistake, if the mistake is established

in a clear and convincing manner. Hutchinson v. Ainsworth, 73 Cal.

As a general rule, a mistake must be mutual to be reformed, but when persons are dealing together, and have entered into a contract, and, in reducing the contract to writing, or executing or performing the same, one person makes a mistake which is known to the other, it is the duty of the person having knowledge of the mistake to inform the other at the time, and this is true regardless of whom the mistake favors. Thus a member paid two dollars to a society entitling him to a certificate for one thousand dollars, but the society issued a certificate for two thousand dollars instead of one thousand, which the member had contracted for and directed to be issued to him. When the member received the certificate, he either accepted it by mistake, believing it to be for one thousand dollars, or he knew of the mistake on the part of the society and with such knowledge received and kept the certificate. In either event the society was entitled to a reformation of it.¹ When an agreement has been satisfactorily established, if it appears that a mistake in reducing it to writing was known to one of the parties, who, with knowledge of the ignorance of the

452; 15 Pac. Rep. 82. A bill in equity to reform a written instrument will not lie where the only evidence of a mutual mistake is that complainants, being unable to understand English, relied upon statements of the defendants, which were in fact untrue, as to the meaning of the document. *Fehlberg v. Cosine*, 16 R. I. 162; 13 Atl. Rep. 110; *Daniel v. Ins. Co.*, 34 N. J. Eq. 30; *Harrison v. Ins. Co.*, 30 Fed. Rep. 862. A court will only decree the reformation of an instrument to enable a party thereto to assert or maintain some right thereunder, and it will refuse the reformation of a policy of insurance when it appears, that, by reason of the lapse of time, no action may be maintained thereon for any cause when reformed. *Thompson v. Ins. Co.*, 25 Fed. Rep. 296; see *Spare v. Ins. Co.*, 17 Fed. Rep. 568. An insurance policy may be reformed to correct a mistake made by an agent.

Goldsmith v. Ins. Co., 18 Abb. N. C. 325; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Franklin Ins. Co. v. Martin*, 40 N. J. Eq. 574; *Ins. Co. v. Wilkinson*, 13 Wall. 222. Compare *Parsons v. Bignold*, 13 Simon's Ch. 518. In the absence of satisfactory proof of fraud, or misrepresentation on the part of the society, the member who is guilty of laches in having accepted and acted on the policy for years can not have the contract changed to conform to his recollection of the terms agreed upon. *Zal-lee v. Ins. Co.*, 12 Mo. App. 111; *Massey v. Ins. Co.*, 70 Ga. 794; *Steines v. Ins. Co.*, 34 Fed. Rep. 441; *Fowler v. Ins. Co.*, 28 L. J. Ch. 225.

¹ *Gray v. Supreme Lodge*, 118 Ind. 293; 20 N. East. Rep. 833; *Snell v. Ins. Co.*, 98 U. S. 85, 88; *Thompson v. Ins. Co.*, 136 U. S. 287; 10 Sup. Ct. Rep. 1019; *Ætna Life v. Brodie*, 5 Can. Sup. Ct. 1.

other, nevertheless kept silent when he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement, and that the mistake was not mutual.¹ When a mutual mistake has been made in reducing a contract to writing, the party, if entitled to relief at all, is entitled to have the contract reformed so as to speak the truth and to have it enforced according to the terms as in fact agreed upon. Where a certificate was by mistake issued for two thousand instead of for one thousand dollars, it was held not to avail the beneficiary, that, after the death of the member, she offered to pay or allow to be deducted from the two thousand dollars an amount equal to the assessments paid by the deceased member on the contract of insurance for one thousand dollars; and it was further held that the beneficiary could not defeat a reformation of the contract by showing that while relying upon the certificate and expecting to receive the full sum of two thousand dollars, she contracted debts and spent sums of money which she would not have contracted nor expended had she had knowledge or notice of the alleged mistake.² A society has the power to correct a mistake by issuing a new certificate in place of the old one, even though the member can not prove sufficient facts to compel it in equity to make the correction.³

§ 153. **Reformation of certificate, inserting name of beneficiary.**—A certificate of membership in a mutual benefit society may be reformed, after the death of the member, by inserting the name of a beneficiary, when it appears that the secretary of the association and the assured both understood at the time of the application, that the proposed name should be entered upon the record without further direction, and where it was the duty of the secretary to enter upon the records the names of the beneficiaries of the members.⁴ A certificate is

¹ Roszell v. Roszell, 109 Ind. 354; 10 N. East. Rep. 114; Peasley v. McFadden, 68 Cal. 611; 10 Pac. Rep. 179; Davison, 3 Adol. & E. 303; Spauld-Town of Essex v. Day, 52 Conn. 483; 1 Atl. Rep. 620; James v. Cutler, 54 Wis. 172; 10 N. W. Rep. 147.

² Gray v. Supreme Lodge, 118 Ind. 293; 20 N. East. Rep. 833.

³ Ford v. U. S. Mutual, 148 Mass. 153; 19 N. East. Rep. 169; Mead v. East. Rep. 638.

⁴ Scott v. Provident Mutual, 63 N. H. 556; 4 Atl. Rep. 792; 2 New Eng. Rep. 286; see Globe Ins. Co. v. Boyle,

admissible in evidence in an action upon it, though it does not name the beneficiary, and the application may be admitted to show who the beneficiary really is.¹

§ 154. **Novation of the contract.**—The constitution and laws of the Supreme Lodge of the Ancient Order of United Workmen, a corporation under the laws of Kentucky, provided that in certain events the subordinate divisions known as "Grand Lodges" might be set apart from the supreme lodge, and thereafter collect and disburse their own beneficiary funds. Plaintiff, as a member of the grand lodge of Massachusetts, received a benefit certificate under the seal of the supreme lodge. Afterward the grand lodge was set

21 Oh. St. 119; Newman v. Association, 76 Iowa 56. The opinion in Scott v. Provident Mutual, *supra*, is as follows: "The defendants contracted to pay a sum not exceeding \$2,000 as a benefit, upon due notice of the death of (the member), and the surrender of his certificate of membership, 'to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct the same to be paid.' The bill alleges, and the demurrer admits, that at the time he made application for membership, he stated to the association, which means to its proper officer or officers, that it was his intention that the benefit should be paid to the plaintiff, to whom he was then, and at the time of his decease, betrothed. The prayer of the bill is for a reformation of the contract by inserting in the membership certificate the name of the plaintiff as beneficiary, and that the benefit may be paid to her. Section 3 of article 4 of the by-laws makes it the duty of the secretary to keep a record of the members of the association and the persons 'to whom the relief is to be paid.' If the fact is found at the trial term that the parties understood direction as given to enter the plaintiff's name upon

the record book as the beneficiary to whom the benefit is payable, and that (the member) understood that her name would be so entered without further direction given him, it was the duty of the secretary to enter it; and the accident or mistake was one which equity will remedy. The accident could not be said to have arisen from the negligence or fault of (the member), so as to preclude relief. Story Eq. Jur., § 105. Nor would it be the case of the non-execution of a power as distinguished from a trust, where equity does not afford relief. *Idem*, §§ 169, 170. As equity interposes only as between the original parties and those claiming under them in privity (1 Story Eq. Jur., §§ 105, 165) objection may be obviated by an amendment joining (the member's) administrator as co-plaintiff. She may then prosecute this suit in his name, giving him indemnity, if he requires it, against costs and expenses. The bill should also contain a prayer that the plaintiff's name may be inserted in the record book as (the member's) beneficiary."

¹ Norristown v. Ins. Co., 132 Pa. St. 385; 19 Atl. Rep. 270; see Thompson, Receiver, v. Ins. Co., 136 U. S. 287.

apart, and a proper proportion of the beneficiary fund turned over to it. Later the grand lodge was incorporated under the laws of Massachusetts, and assumed and promised to pay "all the obligations and liabilities of, and beneficiary and other claims against, said association, whether already accrued or hereafter payable." After this change the member paid his assessments to the new corporation, and was recognized as a member in good standing until his death. It was held that this effected a complete novation of the contract, and the new corporation was liable on the certificate.¹

§ 155. "**In good standing.**"—In an action on a certificate of membership, reciting that the deceased is a "beneficiary member in good standing" in the society, and that, upon his death, a sum named will be paid, "provided he be in good standing when he dies," the certificate is proof of the good standing of the party named at the time it issued, and such standing will be presumed to have continued, in the absence of contrary evidence. In such case, the burden is on the society to show that by reason of his conduct, or his failure to comply with the regulations or requirements of the society, the deceased member had lost his good standing.² Where the contract of insurance is issued upon the express condition that the member shall keep his pledge of total abstinence and comply with the laws of the society, and provides that if he die in good standing, his beneficiary shall be entitled to the benefit fund, the violation of the pledge of total abstinence alone forfeits the rights of the beneficiary to recover the sum provided for. In such a case it may be shown by parol that he violated his pledge, and the trial and conviction by the society for such violation need not be shown in order to defeat a recovery.³ Where the by-laws of an unincorporated society provide that a member shall forfeit his rights in the benefit fund in case he shall neglect his Easter duty of confession, he is not

¹ Burns v. Grand Lodge, 153 Mass. Mo. App. 463; O'Grady v. Knights, 173; 26 N. East. Rep. 443. 62 Conn. 223; 25 Atl. Rep. 111; High

² Stewart v. Association, 36 Mo. Court v. Zak, 136 Ill. 185. App. 319; Supreme Lodge v. Johnson, 78 Ind. 110; Mills v. Rebstock, 29 Minn. 380; Millard v. Supreme Council, 81 Cal. 340; 22 Pac. Rep. 864; Mulroy v. Knights of Honor, 28

³ Royal Templars v. Curd, 111 Ill. 284; Hogins v. Supreme Council, 76 Cal. 109; 18 Pacific Rep. 125; Smith v. Association, 36 Mo. App. 184.

in good standing unless he regularly performs such duty; and his neglect of such duty may be shown in an action by the beneficiary on his certificate.¹

Where the constitution and by-laws of an unincorporated mutual benefit society provide that its members shall pay dues and assessments for insurance according to a certain plan, and that each member shall be a communicant in the Roman Catholic church, and shall yearly go to confession to a priest of that church, and receive the holy communion, which provisions of the constitution and by-laws were well known to the member at the time he entered into the contract of insurance, the member must not only pay his dues and assessments, in order to remain in good standing in the society, but must also perform his duty of confession and communion, or forfeit his rights under the contract.² It was urged in this case that these provisions for yearly confession and communion were contrary to the constitution of the United States, and the constitution of the State of Kentucky, upon the subject of freedom of religious worship, but the court held that they were clearly legal and binding upon members of an unincorporated society who had agreed to be bound by them. In *People v. Benevolent Society*,³ it is suggested in the opinion that provisions of a by-law requiring the practice of religious duties, such as confession and communion, according to the practice and teachings of any particular faith, as conditions of membership in an insurance society, are not obligatory upon members, because they are contrary to the provision of the constitution of the state of New York, Article I, Sec. 3: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind." But the decision is placed upon other grounds—that the proceedings of expulsion were invalid, and that a religious society could not be organized under the act providing for the incorporation of charitable and benevolent institutions. A limitation of relief in case of disability to members in good standing requires only that they shall be in good standing when disabled.⁴

¹ *Matt v. Society*, 70 Iowa, 455; 30 431, but not reported in Kentucky N. W. Rep. 799. Reports.

² *Hitter v. St. Aloysius Society*, 324 How. Pr. 216.

Kentucky Court of Appeals, reported *McMahon v. Supreme Council*, 54 in Albany Law Journal, vol. 27, p. Mo. App. 468.

Where a contract provides that a fund shall be paid to the beneficiary of any member in good standing at the time of his death, and that a member shall be deemed in good standing for the purpose of the benefit fund, who at the time of his death was not indebted to the society, the payment by the beneficiary of past due assessments a few hours before the death of the member entitles him to the fund, though the member is not reinstated to membership thereby for failure to comply with the by-laws with reference to reinstatement to the privileges of membership.¹

§ 156. **Suicide.**—Contracts of insurance usually stipulate that the insurer shall be exempt from liability in case of the death of the insured by suicide. Courts have spent much time and great labor in endeavoring to determine the meaning of the words in which this exemption has been expressed. It is generally agreed that the terms "die by his own hand," "suicide," "self-murder," and the like are synonymous.² There is, however, not only an irreconcilable difference in the opinions of courts as to their proper meaning, but also a noticeable want of harmony in the opinions of the judges of the different courts which have passed upon the subject. It would require too much space to follow the courts and the judges who have written dissenting opinions through their courses of reasoning and processes of distinction on the question whether the insanity of the insured at the time of his suicide takes the case out of the exemption from liability which the insurer has provided for, but it will be sufficient here to state that there are authorities holding that it does,³ and others holding

¹ O'Grady v. Knights, 62 Conn. 223. Inconsistent provisions of the by-laws were construed in this case.

² Schultz v. Ins. Co., 40 Oh. St. 217; Phadenhauer v. Ins. Co., 7 Heiskell (Tenn.) 567; Breasted v. Ins. Co., 8 N. Y. 299; Cooper v. Ins. Co., 102 Mass. 227.

³ A policy of insurance which stipulates that it shall be void if the insured shall die by suicide is not forfeited by reason of the fact that he destroyed his life while insane and unable to understand the moral char-

acter, the general nature, consequences and effect of the act, even though he knew and intended that his death should result from his act. Life Ins. Co. v. Terry, 82 U. S. 580; Conn. Mutual v. Groom, 86 Pa. St. 92; Eastabrook v. Ins. Co., 54 Me. 224; Breasted v. Company, 8 N. Y. 299; Van Zandt v. Ins. Co., 55 N. Y. 169; distinguishing Life Ins. Co. v. Terry, *supra* and Breasted v. Company, *supra*; Schultz v. Ins. Co., 40 Oh. St. 217; Phadenhauer v. Ins. Co., 7 Heiskell (Tenn.) 567; Newton v. Ins.

that it does not.¹ A condition that the policy shall be void if the insured shall "die by his own hand or act, voluntary or otherwise" does not cover the case of his death by accident or unintentional self-killing. It does not apply where his death resulted from his accidentally and innocently taking poison while sane.² Conditions in the contract, providing that it shall be void if the insured shall "die by his own hand or act, sane or insane," or "die by suicide, sane or insane," have been inserted to avoid the question of the insanity of the insured if he should commit suicide. They have been sustained at least to this extent that the contract is avoided if the insured knew what he was doing, realized the consequences of his act, and intended to take his life.³

Co., 76 N. Y. 426; Phillips v. Ins. Co., 26 La. Ann. 404; Waters v. Ins. Co., 2 Fed. Rep. 892; Suppiger v. Association, 20 Ill. App. 595; John Hancock Ins. Co. v. Moore, 34 Mich. 41; Scheffer v. Ins. Co., 25 Minn. 534; Association v. Waller, 57 Ga. 533; Merritt v. Ins. Co., 55 Ga. 103; 59 Ga. 564; Hathaway v. Ins. Co., 48 Vt. 335; Knickerbocker Ins. Co. v. Peters, 42 Md. 414; Adkins v. Ins. Co., 70 Mo. 27; Michigan Mutual v. Naugle, 130 Ind. 79; 29 N. East. Rep. 393.

¹ Where the policy provides that it shall be void if the insured shall die by suicide it is avoided by his self-destruction, even though he was at the time impelled by an insane impulse which he was unable to resist, and was unable to judge between right and wrong.

Borradaile v. Hunter, 5 M. & G. 639; Cooper v. Ins. Co., 102 Mass. 227; Dean v. Ins. Co., 4 Allen. 96; Clift v. Schwabe, 54 Eng. Com. L. Rep. 437; Streeter v. Society, 65 Mich. 199; 31 N. W. Rep. 779; Sabin v. Union, 90 Mich. 177; 51 N. W. Rep. 202; Billings v. Ins. Co., 64 Vt. 78; 24 Atl. Rep. 656.

² Keels v. Association, 29 Fed. Rep. 198; Penfold v. Ins. Co., 85 N. Y. 317; 39 Am. Rep. 660; Equitable Life v.

Paterson, 41 Ga. 338; Edwards v. Ins. Co., 20 Fed. Rep. 661; Pierce v. Ins. Co., 34 Wis. 389; Shank v. Society, 84 Pa. St. 385; Lawrence v. Ins. Co., 5 Ill. App. 280; 8 Ill. App. 488; 9 Ins. L. J. 313; N. W. Ins. Co. v. Hazlett, 105 Ind. 212; Michigan Mutual v. Naugle, 130 Ind. 79; 29 N. East. Rep. 393.

³ Bigelow v. Ins. Co., 93 U. S. 284; Riley v. Ins. Co., 25 Fed. Rep. 315; Adkins v. Ins. Co., 70 Mo. 27; 35 Am. Rep. 410; Pierce v. Ins. Co., 34 Wis. 389; 5 Big. L. & A. Cas. 498; Supreme Commandery v. Ainsworth, 71 Ala. 436; 46 Am. Rep. 332; Mallory v. Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410; Suppiger v. Association, 20 Ill. App. 595; Sabin v. National Union, 90 Mich. 177; 51 N. W. Rep. 202; Streeter v. Society, 65 Mich. 199; 31 N. W. Rep. 779. "Shall under any circumstances, die by his own hand." A proper construction of this proviso requires that the words "under any circumstances" be disregarded as too general and indefinite. Schultz v. Ins. Co. 40 Oh. St. 217. "Shall die by his own hand or act, voluntary or otherwise." The words "or otherwise" were held of uncertain meaning and void. Jacobs v. Ins. Co., 1 McArthur 632; 5 Big.

It is proper for the parties to stipulate in the contract that a limited and fixed amount shall be paid in case the insured shall take his life while insane.¹ The suicide of the insured does not avoid the contract unless it is expressly so stipulated.² But a certificate obtained by a sane person in anticipation of suicide for the purpose of providing for his creditors and family, although it contains no clause avoiding it in the event of suicide, is fraudulent in its inception, and can have no binding force.³ In the absence of evidence to the contrary it will be presumed that death by drowning was the result of accident and not of suicide, and where there is no evidence as to the cause of the death of the insured, the presumption is that it was from natural causes, and not an act of self-destruction.⁴ But where the evidence is equally balanced as to whether the death was by suicide or not, it is error to instruct the jury that if the evidence leaves the matter in doubt, the presumption is that the death was produced by natural causes, and not by self-destruction.⁵ The burden is upon the society to prove that the deceased committed suicide, if it alleges such to be the fact, but if the plaintiff in the proofs of death has stated that the death was by suicide, it is incumbent on him to satisfy

L. & A. Rep. 42; *contra*, Penfold v. Ins. Co., 85 N. Y. 317. "Die by self-destruction, felonious or otherwise" includes all cases of voluntary self-destruction, sane or insane. Riley v. Ins. Co., 25 Fed. Rep. 315. "Die by suicide, felonious or otherwise, sane or insane," expressly excludes a limitation to a case of self-murder. Pierce v. Ins. Co., 34 Wis. 389.

¹Salentine v. Ins. Co., 24 Fed. Rep. 159; see Frey v. Ins. Co., 56 Mich. 29.

²Darrow v. Society, 116 N. Y. 537; 22 N. East. Rep. 1093; 42 Hun 245; Mills v. Robstock, 29 Minn. 380; 13 N. W. Rep. 162; Fitch v. Ins. Co., 59 N. Y. 573; Patrick v. Ins. Co., 4 Hun 263; Horn v. Association, 7 Jur. N. S. 673. It may be, however, that some distinction should be made between a case where the insured was sane at the time and a case where he

was insane. See Hartman v. Ins. Co., 21 Pa. St. 466; Bank v. Ins. Co., 5 Big. L. & A. Cas. 478.

³Smith v. Benefit Society, 22 N. Y. St. Rep. 852; 51 Hun 575; 123 N. Y. 85.

⁴Mallory v. Ins. Co., 47 N. Y. 52; 2 Ins. L. J. 839; Pierce v. Ins. Co., 34 Wis. 389; Shank v. Society, 84 Pa. St. 385; Lawrence v. Ins. Co., 5 Ill. App. 280; 8 Ill. App. 488; Wright v. Ins. Co., 29 Up. Can. C. P. 221; Washburn v. Society, 10 N. Y. Supp. 366; Knickerbocker Ins. Co. v. Jordan, 7 Cin. Law Bull. 71; Travelers Ins. Co. v. McConkey, 127 U. S. 661; 8 Sup. Ct. Rep. 1360; 17 Ins. L. J. 585; Cronkhite v. Ins. Co., 75 Wis. 116; 43 N. W. Rep. 731; Accident Ins. Co. v. Bennett, 90 Tenn. 256; 16 S. W. Rep. 723.

⁵Guardian Mutual v. Hogan, 80 Ill. 47.

the jury that he was mistaken in the statement, and that the death was from natural causes, or was caused by accident.¹

Where, in an action on an accident policy to recover for the death of the insured, there is but little evidence to justify a jury in deciding which one of several theories as to the cause of death is the correct one, but what evidence there is supports the theory of suicide, rather than accidental death, a verdict for plaintiff must be set aside.² Where the verdict of a coroner's jury, finding that the deceased had come to his death by suicide, was annexed to the proof of death, it was held that the burden was on the insurer to prove the suicide of the deceased.³

§ 157. **Known violation of the law—Unlawful act.**—Contracts of insurance usually provide that the society shall not be liable in case of the death or injury of the member while engaged in, or in consequence of any unlawful act, but in such cases, the contract is not avoided by the mere fact that, at the time of his death, the assured was violating the law, if the death occurred from some cause other than such violation.⁴ It is sufficient to relieve the society if the known violation of law was such as to proximately lead to the death of the assured by bringing him into danger of losing his life.⁵ In *Cluff v. Ins. Co.*⁶ it was held that in order to avoid the contract of insurance on the ground that the insured died while violating the law of a state, the company must prove that the assured died while engaged in a voluntary criminal act.⁷ This decision is criticised in *Bradley v. Mutual Benefit*, *supra*, and *Bloom v. Franklin Life*, *supra*, and its soundness denied. In the latter case, the court holds this to be the law: "A known violation of a positive law, whether the law is a

¹ *Keels v. Association*, 29 Fed. Rep. 20 Neb. 620; 31 N. W. Rep. 122; 198; *Mutual Ben. Ins. Co. v. Newton*, Harper's Admr. v. Phoenix Ins. Co., 89 U. S. 38; *Dennis v. Union Mutual* 19 Mo. 506; *Bradley v. Mutual Benefit*, 45 N. Y. 422; *Murray v. N. Y. (Cal.)*, 24 Pac. Rep. 120.

² *Merrett v. Preferred Masonic*, 98 Mich. 338; 57 N. W. Rep. 169.

³ *Goldschmidt v. Ins. Co.*, 102 N. 478; *Insurance Co. v. Seaver*, 86 U. Y. 486; 7 N. East. Rep. 408; see S. 531.

United States L. Ins. Co. v. Vocke, ⁶ 99 Mass. 317.

Adm'r Kielgast, 129 Ill. 557; 22 N. ⁷ *Harper v. Ins. Co.*, 19 Mo. 506; *East. Rep.* 467; see § 326. *Overton v. Ins. Co.*, 39 Mo. 122;

⁴ *Griffin v. West. Mut. Ben. Ass'n*, *Wolff v. Ins. Co.*, 5 Mo. App. 236.

civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequence of the act does not increase the risk." A person insured in a mutual benefit society, entered the office of the state treasurer, obtained, by a show of arms, a sum of money, and was shot and killed while making his escape, but before he had reached the outer door of the capitol. It was held that, as he had obtained the money, and was making his escape when shot, he was not at the instant of death, violating any law, so as to forfeit a certificate of membership containing a clause providing for a forfeiture, in case the insured should "die while violating any law."¹ A policy contained a provision rendering it void, if the insured should die "in consequence of his violation of any law." The insured was killed by H. shortly after having illicit intercourse with the wife of H., and it was held that, even if the act of the insured was a violation of the law, he did not die in consequence of it, within the meaning of the policy, and the policy was not avoided thereby.²

Where a person who is insured deserts from the army, and is shot by a sheriff, who is attempting to arrest him, as alleged in self-defense, it can not be held, as matter of law, that he was engaged in an unlawful act, within the meaning of a policy of accident insurance, providing that no claim shall be made "when the death or injury may have happened * * while engaged in, or in consequence of, any unlawful act." Upon this point the court said: "Nor can it be held, as a matter of law, that (the deserter) was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame. He was shot, if (the sheriff) is to be believed, because he did not throw up his hands when commanded to, and was in the act of drawing a pistol. He was killed, if (a

¹Griffin v. Western Mutual, 20 Supreme Ct., 572; 3 Hun 515; see Neb. 620; 31 N. W. Rep. 122. Gresham v. Ins. Co., 87 Ga. 497; 13

²Goetzmann v. Conn. Mut. Life S. East. Rep. 752.
Ins. Co., 5 Thompson & Cook (N. Y.

witness) is to be believed, without provocation, and in a wanton and murderous manner, as soon as his head appeared in the door. Whether he was doing anything unlawful at the time of the shooting was a question for the jury, to be determined by them under all the circumstances of the case."¹ Where persons are by law prohibited from walking on a railroad track, it is an unlawful act, within the meaning of a policy, to use such a track as a highway.² The common law definition of an affray does not involve an agreement to fight, and, where the common law on this subject is in force, an insured may possibly engage in an affray, without having agreed to fight, and without any culpable fault on his part. He may engage in an affray in defense of his person against the assaults of his adversary or adversaries, and thus receive accidental injuries without any fault or wrong on his part, and without being guilty of an unlawful act.³ In an action on an accident insurance policy, containing a condition that the insurers would not be liable for a death by an accident caused by a violation of law, a recovery can not be had in a state where horse-racing is a misdemeanor, for a death by accident while engaged in a horse-race. While the insured and another were engaged in horse-racing, their sulkies came into collision, and the insured jumped to the ground. He was entirely clear from the sulky, harness and reins, and started forward to stop his horse. In attempting to do so he was killed; and it was held that his death was caused by a violation of the law, although his opponent may have disregarded the rules of the course, and may have intentionally sought to run him off the track.⁴

Under a policy stipulating that the insurance does not extend to injuries received while engaged in, or in consequence of, any unlawful act, the fact that the assured was killed while living in a state of fornication with his mistress does not prevent a recovery, where it does not appear that the infliction of injury is a natural and necessary consequence

¹ *Utter v. Ins. Co.*, 65 Mich. 545; 32 Ind. 133; see *Gresham v. Ins. Co.*, 87 Ga. 497; 13 S. East. Rep. 752.

² *Neill v. Ins. Co.*, 31 Up. Can. C. P. 394.

⁴ *Travelers' Ins. Co. v. Seaver*, 86 U. S. (19 Wall.) 531.

³ *Supreme Council v. Garrigus*, 104

of the unlawful association as its probable and natural result.¹ Fornication, or "being in a state of fornication," however immoral and wrong, must be accompanied with circumstances of notoriety or publicity to make it an unlawful act. A woman whose life was insured procured an abortion to be performed on her and died from the effects of the miscarriage. The court held that there could be no recovery, because the act which caused her death was unlawful.² A person who walks from one town to another on Sunday, for the purpose of hunting, violates the statutes of Vermont, which forbid hunting on Sunday, or traveling on Sunday except from necessity or charity; and an injury occasioned by his slipping on frozen ground, while returning home from hunting on Sunday, is not covered by an accident insurance policy, exempting the company from liability where a "violation of law" is the act, cause or condition, "wholly or partly, directly or indirectly," producing the injury, or where the injury is "effected by any such act, cause or condition, or under its influence."³ In New York suicide is not a crime, though an attempt to commit suicide is. The fact that a member killed himself, is not, therefore, in that state a defense to an action, under the provision of the contract that it should be void if he should "die in violation of or attempt to violate any criminal law."⁴ It seems to be well settled that acts which are criminal by the common law and the laws of all civilized countries will be presumed to be criminal by the laws of the states of the union, and it will be presumed that the insured knew that an act of this character was criminal at the place where he committed it.⁵

A defense that the injury was sustained while violating the law, contrary to the provisions of an accident policy, need not be established beyond a reasonable doubt. A preponderance of evidence is sufficient.⁶

¹ Accident Ins. Co. v. Bennett, 90 39 Minn. 312; 39 N. W. Rep. 312. Tenn. 256; 16 S. W. Rep. 723.

⁵ Cluff v. Ins. Co., 13 Allen 308;

² Hatch v. Ins. Co., 120 Mass. 550. Bradley v. Ins. Co., 3 Lans. 341; 45

³ Duran v. Ins. Co., 63 Vt. 437; 22 N. Y. 422.

Atl. R. p. 530.

⁶ N. Y. Acc. Co. v. Clayton, 59 Fed.

⁴ Darrow v. Society, 116 N. Y. 537; Rep. 559; Rothchild v. Ins. Co., 62 22 N. East. Rep. 1093; affirming 42 Mo. 356; Mathews v. Huntley, 9 N. H. Hun 245; see Kerr v. Association, 146; Welch v. Jugenheimer, 56 Iowa

11; 8 N. W. Rep. 673; *Blaeser v. Ins.* 9 Fed. Rep. 249; *Meacham v. Association*, 120 N. Y. 237; *McGinley v. Ins. Co.*, 37 Wis. 31. Good health, free from disease, serious illness; see *Peacock v. Ins. Co.*, 20 N. Y. 296; *S. C.*, 1 *Boswell* 338; *Grattan v. Ins. Co.* 92 N. Y. 274; *Smith v. Ins. Co.*, 49 N. Y. 211; *Ferguson v. Ins. Co.*, 32 Hun 306; *Conn. Ins. Co. v. McMurdy*, 89 Pa. St. 363; *Illinois Masons v. Winthrop*, 85 Ill. 537; *Goucher v. Association*, 20 Fed. Rep. 596; *Conver v. Ins. Co.*, 3 *Dillon* 216; *Brown v. Ins. Co.*, 65 Mich. 303; 32 N. W. Rep. 612; 8 West. Rep. 775; *Morrison v. Odd Fellows Mutual*, 59 Wis. 170; *Alabama Ins. Co. v. Johnston*, 80 Ala. 467; *Galbraith v. Arlington Mutual*, 12 Bush (Ky.) 29; *Powers v. Association*, 50 Vt. 630; *Schwarzbach v. Union*, 25 W. Va. 622; *N. W. Mutual v. Heimann*, 93 Ind. 24; *Continental Ins. Co. v. Yung*, 113 Ind. 159; 15 N. East. Rep. 220; 12 West. Rep. 715; *Moulou v. Ins. Co.*, 111 U. S. 335; *Conn. Mutual v. Trust Co.* 112 U. S. 250; *Maine Association v. Parks*, 81 Me. 79; *Singleton v. Ins. Co.*, 66 Mo. 63; 27 Am. Rep. 321; *Mutual Benefit v. Wise*, 34 Md. 599; *Campbell v. Ins. Co.*, 98 Mass. 381; *Vose v. Ins. Co.*, 6 Cush. (Mass.) 42; *Piedritzki v. Supreme Lodge*, 76 Mich. 429; 43 N. W. Rep. 373; *Ins. Co. v. Francisco*, 84 U. S. 672; see § 399. Sober and temperate, intoxicating liquors; see *N. W. Ins. Co. v. Bank*, 122 U. S. 501; *Ætna Ins. Co. v. Davey*, 123 U. S. 739; *S. C.*, 38 Fed. Rep. 650; *Knickerbocker Ins. Co. v. Foley*, 105 U. S. 350; *Brockway v. Ins. Co.*, 9 Fed. Rep. 249; *Meacham v. Association*, 120 N. Y. 237; *McGinley v. Ins. Co.*, 77 N. Y. 605; *S. C.*, 8 Daly 390; *Ætna Ins. Co. v. Deming*, 123 Ind. 384; *John Hancock Mutual v. Daly*, 65 Ind. 6; *Hartwell v. Ins. Co.*, 33 La. Ann. 1353; *United Brethren v. O'Hara*, 120 Pa. St. 256; *Union Mutual v. Reif*, 36 Oh. St. 596; *Mowry v. Ins. Co.*, 9 R. I. 346; *Ins. Co. v. Stibbe*, 46 Md. 302; *Newman v. Association*, 76 Iowa 56; 33 N. W. Rep. 662; *Grand Lodge v. Brand*, 29 Neb. 644; 46 N. W. Rep. 95; *Mair v. Ins. Co.*, 37 L. T. Rep. 356; *Shader v. Ins. Co.*, 66 N. Y. 441; *Miller v. Ins. Co.*, 31 Iowa 216; 34 Id. 222; 39 Id. 304; *Van Valkenburg v. Ins. Co.*, 70 N. Y. 605; 9 Hun 583. Medical attendance, attending physician; see *Elington v. Ins. Co.*, 67 N. Y. 185; *Cushman v. Ins. Co.*, 70 N. Y. 72; *Price v. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Cobb v. Association*, 153 Mass. 176; 26 N. East. Rep. 230; *Monk v. Ins. Co.*, 6 *Robertson* (N. Y.), 455; *Metropolitan Ins. Co. v. McTague*, 49 N. J. Law, 537; 9 Atl. Rep. 766; *McCollum v. Ins. Co.*, 55 Hun 103; *Dentz v. O'Neill*, 25 Hun 442; *Phillips v. Ins. Co.*, 9 N. Y. Supp. 836; *Scoles v. Ins. Co.*, 42 Cal. 523; *Reid v. Ins. Co.*, 58 Mo. 421; *Brown v. Ins. Co.*, 65 Mich. 306; 32 N. W. Rep. 613; 8 West. Rep. 775; *Hutton v. Society*, 1 *Foster & Finn*, 735; *World Mutual v. Schultz*, 73 Ill. 586; *O'Hara v. United Brethren*, 134 Pa. St. 417; *Miller v. Ins. Co.*, 14 Ont. App. 218.

CHAPTER XI.

WHO MAY BE A BENEFICIARY—INSURABLE INTEREST.—PART I.

§ 158, 159. Classes of beneficiaries specified in the charter.

160. The terms of the charter are to be liberally construed.

161. Any person belonging to a specified class may be the beneficiary.

162. Effect of amendment of the organic law of a society.

163. When an unincorporated lodge may be the beneficiary.

164. When a divorced wife may be the beneficiary.

§ 158. Classes of beneficiaries specified in the charter.—

The laws providing for the organization of mutual benefit societies usually specify the classes of persons who may be made the beneficiaries of the insurance. In the absence of such restrictions any person may be designated to take the fund, who is capable of taking it under the terms of the constitution and by-laws of the society, subject to the law of insurable interest in the life of the member. This doctrine of insurable interest has given rise to much controversy in suits upon ordinary contracts of insurance, but an extended notice of the law on that subject is not necessary in a work on mutual benefit societies. Where the organic law of a society, or the charter procured from the state under that law prescribes what classes of persons may become beneficiaries of its insurance, it is not in the power of the society or one of its members, or both, to enlarge or restrict these classes.¹ Where the statutes under which a mutual benefit society is incorporated, or its charter adopted under such statutes, designate certain classes of persons who may be the beneficiaries of its funds, a person who does not belong to any of such classes is not entitled to take the fund. The society has no authority to create a fund for a person who does not belong to one of such classes, and the member has no power or right to desig-

¹ Kentucky *Masonic v. Miller's Mutual v. Rolfe*, 76 Mich. 146; *Hy-Adm'r*, 13 Bush (Ky.) 489; *Rindge singer v. Supreme Lodge*, 42 Mo. v. Ins. Co., 146 Mass. 286; *Michigan App.* 627; see §§ 13, 20, 215, 220.

nate such a person as his beneficiary. Neither the act of the society in issuing a certificate payable to such a person, nor the act of the member in appointing him, can deprive the beneficiaries designated by law of their right to, and interest in the fund. The designation of such a person is void, and in determining who is entitled to the fund, the question will be considered just as if no designation whatever had been made. When the charter of a society names certain classes of persons, to whom alone the benefit fund may be paid, and gives to the member the right to select and appoint the person or persons of those classes to whom it shall be paid, if no one is selected, it is payable to one of the classes named. And, where the member has named a person not within the class to be benefited, and the corporation has issued the certificate to the person so designated, these acts will not deprive the proper person or class of persons of the right to and interest in the fund. Where the charter provides that the benefit shall be payable to the "widows, orphans, or other relatives of deceased members, or persons dependent upon deceased members," the designation of a person who is neither related to nor dependent upon the member, will not deprive his widow, children or dependents of their right to the fund, but it will be paid to them as if no designation had been made.¹

In Ohio, the law provided for the organization of mutual benefit societies "for the payment of stipulated sums of money to the families or heirs of deceased members." A certificate of membership in a society organized under this law was issued, payable to the assured member, "or any person designated by his will, or his heirs if no person is designated herein, or by will." It was held that the assured was not thereby authorized to constitute by testamentary appointment, as beneficiary of such insurance, a person who was not of the family

¹Supreme Council v. Perry, 140 East. Rep. 443; Keener v. Grand Mass. 589; 5 N. East. Rep. 636; Britton v. Supreme Council, 46 N. J. Eq. Society, 8 Ky. L. Rep. 520; Kentucky 102; 18 Atl. Rep. 675; Park v. Grangers v. McGregor, 7 Ky. L. Rep. Welch, 33 Ill. App. 188; Palmer v. 750; Alexander v. Parker, 144 Ill. Welch, 132 Ill. 141; 23 N. East. Rep. 355; 33 N. East. Rep. 183; Sargent v. 412; Rindge v. Association, 146 Mass. Supreme Lodge, 158 Mass. 557; 33 N. 286; 15 N. East. Rep. 628; Burns v. East. Rep. 650. Grand Lodge, 153 Mass. 173; 26 N.

of the assured, or who would not, upon his death, become his heir.¹ The law of Michigan authorizes the organization of societies to secure "to the family or heirs of any member upon his death" a certain sum of money. This language of the law excludes as beneficiary a person who is not related to the assured, but who was an old army comrade and intimate friend living with him.² Where the object of a society is to pay the "legal heirs and beneficiaries" of a deceased member a benefit fund,³ or "to assist the widows, orphans, or other dependents of deceased members,"⁴ the designation by a member of his estate as his beneficiary is invalid as contrary to the charter. A society incorporated "for the payment of stipulated sums of money to the family or heirs of deceased members" is not authorized to issue certificates of membership payable to the named beneficiary "or assigns"—"to himself or assignees"—"to his estate"—"to his executors or administrators" or to any person, whether a relation or not, who is not of his family or heirs.⁵ A by-law of a corporation made in contravention of the terms of the charter, specifying the classes of persons who may be made beneficiaries, is *ultra vires* and void.⁶

A by-law of an incorporated society, prescribing how the members shall direct the payment of the benefit fund, is not inconsistent with a provision of the charter that such fund shall be paid "as the member may direct," provided the rule prescribed by the society is reasonable for that purpose.⁷

§ 159. Where the charter does not designate who may become beneficiaries under a contract of insurance issued by the society,⁸ or where the charter provides that devisees or legatees of a deceased member,⁹ or his assigns,¹⁰ may be made

¹ National Mutual v. Gonser, 43 Ohio St. 1; 1 N. E. Rep. 11; State v. Central Ohio Mutual, 29 Ohio St. 399; State v. People's Mutual, 42 Ohio St. 579.

² Mutual Benefit v. Hoyt, 46 Mich. 473; see Britton v. Supreme Council, 46 N. J. Eq. 102; 18 Atl. Rep. 675.

³ Basye v. Adams, 81 Ky. 371.

⁴ Daniel's Executor v. Pratt, 143 Mass. 216; 10 N. East. Rep. 166.

⁵ State v. Association, 38 Oh. St. 281; State v. Association, 42 Oh. St. 579.

⁶ Briggs v. Earl, 139 Mass. 473; 1 N. East. Rep. 847; see §§ 13, 20.

⁷ Coleman v. Knights of Honor, 18 Mo. App. 189.

⁸ Elkhart Mutual v. Houghton, 103 Ind. 286; 2 N. East. Rep. 763.

⁹ Bloomington Mutual v. Blue, 120 Ill. 121; 11 N. East. Rep. 331; Lamont v. Grand Lodge, 31 Fed. Rep. 177; Martin v. Stubbings, 126 Ill. 387; 18 N. East. Rep. 657; Lamont v. Association, 30 Fed. Rep. 817.

¹⁰ Massey v. Association, 102 N. Y.

beneficiaries, or where it provides that the fund shall be payable as the member may direct,¹ a contract may be issued in the first instance payable to any one who is competent to take the fund under the laws relating to the insurable interest of the beneficiary. Where, by the terms of the charter of a society, the fund is payable "to the legal heirs or beneficiary of a deceased member," the insured has the right to designate any person as his beneficiary, and to exclude any number or all of his heirs.²

§ 160. **Who may be a beneficiary; the terms of the charter are to be liberally construed.**—In determining whether the beneficiary designated by a member in a given case is capable of taking the fund under the charter of the society, courts will give as broad and comprehensive a meaning as possible to the terms of the charter in which the general objects of the society and the classes of persons to be benefited are set forth.³ A. became a member of an incorporated society, the charter of which set forth its object to be "the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members." It was provided in article nineteen of its constitution that the benefit fund, at the death of a member, should "be paid to such person, or persons, as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member." A. borrowed, from his sister, the amount of money which the society would be liable to pay at his death. He designated her on the books of the lodge as the person to whom payment should be made by the society, and she paid his dues to the society. At the death of the

523; 7 N. East. Rep. 619; 34 Hun 254; 366; 13 Ill. App. 510; Mass. Foresters Eckert v. Society, 2 N. Y. Supp. 612. v. Callahan, 146 Mass. 391; Marsh v.

¹ Sabin v. Grand Lodge, 134 N. Y. Supreme Council, 149 Mass. 512; 21 423; 31 N. East. Rep. 1037; 26 N. Y. N. East. Rep. 1070; Klotz v. Klotz Weekly Dig. 309; Ingersoll v. Knights, (Ky.), 22 S. W. Rep. 551.

47 Fed. Rep. 272; Gentry v. Supreme ² Basye v. Adams, 81 Ky. 368.

Lodge, 20 Cent. L. J. 393; Tennessee ³ Martin v. Stubbings, 126 Ill. 387; Lodge v. Ladd, 73 Tenn. (5 Lea) 716; 18 N. East. Rep. 657; Bloomington Barton v. Provident Mutual, 63 N. H. Mutual v. Blue, 120 Ill. 121; 11 N. 535; Mitchell v. Grand Lodge, 70 East. Rep. 331; Bennett v. Van Riper, Iowa, 360; 30 N. W. Rep. 865; Supreme Lodge v. Martin, 12 Ins. L. J. Masonic Association v. Bunch, 109 628; Highland v. Highland, 109 Ill. Mo. 560; 19 S. W. Rep. 25.

member, the benefit fund was claimed by his sister, and also by his widow and children. The supreme court of Pennsylvania held that the amount due from the society must be paid to the sister of the deceased member, and in the opinion said: "The learned court below was of opinion that there was a fatal conflict between the charter and the constitution in respect of the persons who may receive benefits from the defendant company, and for that reason alone refused judgment to the plaintiff (the sister). The second section of the charter, upon which this conclusion is based, is in the following words: 'The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members.' Construing these words, the learned court below held that it was not within the power of the defendant to stipulate for the payment of the benefits to any person, other than the widow and orphans, who might be designated as the recipient by the deceased under article 19 of the constitution. We think this is too narrow and strained a view to take of the second section of the charter quoted above. While it is true that the general purpose of the corporation is there stated to be the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished, and which, doubtless, is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widow or orphans. There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans. Nor is such a contract to be held void by reason of any necessary implication from the language of the charter. For the widow and orphans may be much benefited, and in many ways, by a contract designating another beneficiary, as, for instance, if the member, in his lifetime, desiring to establish a home for his wife and children, which they might hold after his death, borrowed money for that purpose, and so used it, and, to secure the loan, designated the lender as the beneficiary of his membership, certainly his widow and orphans would be materially

benefited by such an arrangement. Or if, having a home, he met with disaster, and was about to lose it by judicial sale, and should save it by a similar provision, his widow and orphans would be thereby benefited. Or if, having property and also debts, but not to the point of insolvency, he could borrow money by means of a membership with such an association, and he should become a member for that very purpose, the creditor possibly paying the dues, and he could to that extent diminish his indebtedness during his life, and thus leave that much more of his property to his widow and orphans, undoubtedly they would be thereby benefited. Or he might borrow the money and give it directly to his wife or children during his life, pledging his membership to the lender as above, and then also they would receive the full advantage of the transaction without waiting until his death. Many more illustrations of a similar character might easily be suggested, but it is unnecessary. They all prove the same proposition, to wit, that it is entirely possible to benefit the widow or orphans by means of such a membership, though neither of them is the designated beneficiary, and hence there is no necessary conflict between the second section of the charter and the nineteenth article of the constitution.

“ But again, the member may be unmarried, or he may have become a widower and without children during his life, though at the time his membership commenced, he may have had both a wife and children. Surely, in such a case, it would not be contended that the company could resist payment if the action were brought by an administrator, even though the money was needed only for the payment of debts, or if brought by a designated beneficiary, who had loaned money on the faith of the membership. Further discussion does not seem to be required.”¹ The laws of Michigan provide for the organization of mutual benefit societies to secure to “the family or heirs of any member, upon his death,” a certain sum of money. An old man became a member of a society organized under this act, and designated as his beneficiary a young woman who was not related to him, but who had lived with him for many years in the same household, and had been treated by him as if she were his daughter. In deciding that such a designation

¹ *Maneely v. Knights of Birmingham*, 115 Pa. St. 305; 9 Atl. Rep. 41.

was within the terms of the above law, the supreme court of Michigan said: "Now this word 'family' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relations, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers. We discover nothing in the statute implying a narrow sense, and we should not be inclined to attribute one where the result would cause injustice. It seems to us that the circumstances constitute a case within the meaning of the legislature."¹

§ 161. **A person belonging to any specified class may be the beneficiary.**—Where several classes of beneficiaries are named in the charter or organic law of the society, a member may take out a certificate payable to one class to the exclusion of the others, or to a person of one class to the exclusion of the other persons in that class. He may determine what person or persons in any of the classes shall be the beneficiary in his particular case. Where the object of the society is to afford "aid and benefit to the widows, orphans, heirs or devisees of deceased members," he may make his certificate payable to the widow, omitting his children, or to one of his children, omitting the others and the widow.² Where the fund is to be paid to the widow for the use of herself and the dependent children of the deceased member, there is a reasonable discretion in the member to make such discriminations in the amounts which the widow and each of the children shall have as will accord with their necessities.⁴

§ 162. **Effect of amendment of the organic law of a society.**—Where the law relating to the classes of beneficiaries who may take the fund of a society has been changed after the organization of the society, so as to include other benefi-

¹ *Carmichael v. Association*, 51 N. W. Rep. 890; see *Thomas v. Mich.* 494. Where an uncle and niece Leake, 67 Texas 469; 3 S. W. Rep. 703; *Masonic Mutual v. McAuley*, 2 held to constitute a family. *Folmer's Mackey (D. C.)* 70; *Basye v. Adams*, Appeal, 87 Pa. St. 133. 81 Ky. 368.

² *Spry v. Williams*, 82 Iowa, 61; 47 ³ *Roberts v. Roberts*, 64 N. C. 695.

ciaries than those first enumerated, the designation by a member of a beneficiary from an added class of beneficiaries is a designation to which the society has a right to assent, and does assent by issuing a certificate to the member payable to such beneficiary, with knowledge that the beneficiary is one of the added class. A mutual benefit society was incorporated under a law providing for the accumulation of a fund "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." Afterward the law was so amended as to read "for the purpose of assisting the widows, orphans, or *other relatives of the deceased*, or any person dependent on deceased members." The society did not adopt the statute amending the act under which it was incorporated. A person who became a member after the amendment of the law designated, as his beneficiary, his mother, who was not then, or at any time afterward, dependent on him for support. Subsequently the member married, and died in good standing in the society, leaving his widow and his mother surviving him. It was held, under these facts, that the amending statute needed no formal adoption by the society, that the designation of his mother was such as he could legally make at that time, as the law which permitted a relation, merely, not being necessarily a dependent, to be designated, was in force when he made his designation, and that his mother was entitled to receive the fund.¹ An act authorizing mutual benefit societies to insure the lives of members for the benefit of creditors does not affect a certificate issued prior to the act by a society organized under a prior law, payable to the creditor of a member, and which was void when issued. In order to make such a certificate valid, it must appear distinctly that the society was such a corporation as could avail itself of the privileges of that act, and, if it could, that it had done so.²

Although a society may have the capacity, under an amending statute, to enlarge the classes of persons who may be made

¹ Massachusetts Order v. Callahan, 146 Mass. 391; 16 N. East. Rep. 14; 217; 15 N. East. Rep. 566; see Summarsh v. Supreme Council, 149 Mass. 512; 21 N. East. Rep. 1070; Harding 580.

v. Littlehale, 150 Mass. 100; 22 N. East. Rep. 703; see § 230.

² Skillings v. Association, 146 Mass. 391; 16 N. East. Rep. 14; 217; 15 N. East. Rep. 566; see Summarsh v. Supreme Council, 149 Mass. 512; 21 N. East. Rep. 1070; Harding 580.

the beneficiaries of its insurance, it may refuse to extend its liability; and if it so refuses, a beneficiary appointed from the added classes will have no right to the fund. In such a case, the question is not what contract the society might have made, but what contract it did make.¹ Where a law providing for the organization of mutual benefit societies is amended so as to exclude certain classes of persons from becoming beneficiaries, the amendment does not apply to a certificate issued prior to its passage.²

§ 162a. Where a law provides that no benefit society shall issue a certificate "unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured member," and a certificate issued before the passage of the act, in favor of a beneficiary not included in the above description, was forfeited for non-payment of an assessment, a reinstatement after the act took effect did not bring the certificate within the provision and prohibition of the law. The reinstatement was not the making of a new contract; it was simply a cancellation of the forfeiture whereby the holder was restored to membership under the contract already existing.³

§ 163. **When an unincorporated lodge may be the beneficiary.**—Where the contract provides that the benefit fund shall be paid to such person or persons as the assured shall designate, and there is nothing in the statutes of the state in which the contract was issued restricting the member in the selection of his beneficiary, an unincorporated lodge which is a part of the unincorporated society issuing the contract is a proper beneficiary.⁴

¹Supreme Council v. Smith, 45 N. J. Eq. 466; 17 Atl. Rep. 770; Britton v. Royal Arcanum, 46 N. J. Eq. 102; 18 Atl. Rep. 675.

²Smith v. Pinch, 80 Mich. 332; 45 N. W. Rep. 183.

³Lindsey v. Society, 84 Iowa, 734; 50 N. W. Rep. 29; see §§ 291, 294.

⁴Bacon v. Brotherhood, 46 Minn. 303; 48 N. W. Rep. 1127. The court said: "We see no good reason why the lodge in question, whether declared a simple association of individ-

uals, or a corporation *de facto*, could not be designated by the assured as his beneficiary. He had become a member of a subordinate lodge, organized and conducted for the benefit of those who joined it. As such member he had received a certificate or policy of insurance, of no value except when countersigned, as it had been, by its officers; he had accepted and participated in benefits conferred upon those only who held a membership, and by reason of such

§ 164. **When a divorced wife may be the beneficiary.**—It has been held in ordinary life insurance that a policy originally valid does not cease to be so by the cessation of the beneficiary's interest in the life insured, unless such be the necessary effect of the provisions of the contract itself; that a wife, having an insurable interest in the life of her husband, is not affected by a decree of divorce, in her right in an insurance policy on his life, payable to her by name or as his survivor.¹ In such a case she takes by contract, and not by reason of the relation of husband and wife, or by reason of her status at the death of the insured. But if the policy is payable to her merely under the designation of "my wife," it would seem that the terms of the policy itself would cut off the interest of a divorced wife in its proceeds, since at the death of the insured she would not answer the description of the designation. Where the charter of a mutual benefit society declares its object to be "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members, or to their heirs," the wife of a member who has been designated by him as a beneficiary, loses her rights as such by obtaining a divorce from him.² It has been held that when the contract of insurance stipulates that the beneficiary must have an insurable interest in the life of the member that interest must exist at the death of such member.³ Accordingly a divorced wife who has remarried, and has no living issue by the member, is not, under

membership; and when called upon to designate a party to whom the amount of his policy should be paid in case of his death, had named the lodge. The assured, under such circumstances, could not have questioned the capacity of such body to take under his designation, and it follows that one who claims under him can not."

¹ Bliss on Life Ins. at § 30; May on Ins. at § 107; Conn. Mutual v. Schaefer, 94 U. S. 457; Phoenix Ins. Co. v. Dunham, 46 Conn. 79; McKee v. Ins. Co., 28 Mo. 383.

² Tyler v. Association, 145 Mass. 134; 13 N. East. Rep. 360; Schon-

field v. Turner, 75 Texas, 324; 12 S. W. Rep. 626; Heyman v. Meyerhoff, 16 W. N. C. (Pa.) 212. In Tyler v. Association, the court declined to decide whether the validity of a description is to be determined at the outset by the relation then existing between the member and the beneficiary, but held that to make the description available at the death, there must then be such a relation to the deceased as is contemplated by the contract of the society.

³ But see Dalby v. Ins. Co., 15 C. B. 365; Conn. Mutual v. Schaefer, 94 U. S. 457.

such a contract, entitled to the benefit fund.¹ When the status of the beneficiary under the contract is the main, if not the sole inducement to the insurance, as where the certificate is in favor of the wife of the member and she is designated mainly by that relationship and description, the rights of such beneficiary lapse if that status does not exist at the time of the death of the member.²

Where the common law is in force a divorce *a mensa et thoro* does not change the property rights of the parties. Its only effect is to compel the parties to live apart, and to deprive the husband of his control over his wife. On the death of the husband after a decree *a mensa et thoro*, the wife becomes his widow, and, as such, succeeds to all the rights in his property, which the law gives to a widow in the property of her deceased husband; and where she was made the beneficiary of his life insurance before such a divorce, she is after his death a proper beneficiary, even when the benefits are by law restricted to "the widows, orphans, or other persons dependent upon deceased members."³ A divorced wife is entitled to no share in a benefit fund payable to the member's heirs.⁴

¹ Order v. Koster, 55 Mo. App. 186.

⁴ Schonfield v. Turner, *supra*; Tyler v. Association, *supra*.

² Order v. Koster, *supra*.

³ Supreme Council v. Smith, 45 N. J. Eq. 466; 17 Atl. Rep. 770.

CHAPTER XI.

WHO MAY BE BENEFICIARY—ASSIGNEE OF CONTRACT.—PART II.

- § 165, 166. When the contract of mutual benefit insurance is assignable.
- 167. Equitable assignment.
- 168. Limitation on the right to assign.
- 169. The consent and approval of the society may be required.
- 170. Rights of the assignee of a certificate.
- 171. Assignment after death of the member.
- 172. Assignment by the beneficiary.
- 173. Designation of new beneficiary is not an assignment of the certificate.
- 174. Law governing the validity of an assignment.

§ 165. **When the contract of mutual benefit insurance is assignable.**—Where a certificate of membership is made payable to the member himself, his legal representatives, his executors and administrators, or his estate, as is permitted by the organic law of mutual benefit societies in some states, he may assign the certificate, provided the assignment is made in good faith, and provided further that in doing so he does not violate the contract of insurance, or the law of the state in which the assignment is made.¹ But where the statute under

¹ It is a point upon which the authorities are in irreconcilable conflict, whether a life insurance policy, valid in its inception, supported by a sufficient insurable interest, may, before a loss occurs, be assigned to one who has no interest in the life assured. It has been held that such an assignment, if made in good faith and not prohibited by the terms of the contract, is valid. *Ohmsted v. Keys*, 85 N. Y. 593; *Clark v. Allen*, 11 R. I. 439; 17 Am. L. Reg. (N. S.) 83 and note; *Fairchild v. Assurance Co.*, 51 Vt. 613-624; *Ashley v. Ashley*, 3 Sim. 149; *Succession of Hearing*, 26 La. Ann. 326; *Palmer v. Merrill*, 6 Cush. 282; 52 Am. Dec. 782, and note; *Miller v. Bowman*, 119 Ind. 448; 21 N. East. Rep. 1094.

There are other cases in which the opposite doctrine is held. *Lyon v. Rolfe* (Mich.), 42 N. W. Rep. 1094; *Cammack v. Lewis*, 15 Wall. 643; *Warnock v. Davis*, 104 U. S. 775; 11 Fed. Rep. 527; *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116; 13 Am. Repts. 313; *Franklin Ins. Co. v. Sefton*, 53 Ind. 380, explaining *Hutson v. Merrifield*, 51 Ind. 24; see *Kessler v. Kuhns*, 1 Ind. App. 511; 27 N. East. Rep. 980; *Stevens v. Warren*, 101 Mass. 564; *Langdon v. Union Mutual*, 14 Fed. Rep. 272; *Missouri Ins. Co. v. Sturges*,

which such a society is organized specifies certain classes of beneficiaries who shall take the fund, a certificate of membership is not assignable, during the life of a member to whom it has been issued, to a person not within the classes named as the beneficiaries of the society. Persons who are not capable of taking the fund by designation as beneficiaries in the first instance can not take it indirectly by assignment of the certificate. These societies are intended to render assistance to the designated classes of persons, in a particular and special method, and their purpose would be defeated by permitting assignments of certificates to be made to other persons.¹ The charter of a society provided, "The business of said association shall be, to afford relief to the widows and children of its deceased members, and to such business it shall be limited and restricted." A policy issued by the society was made payable to the wife of the member, and, in case of her death prior to his, to his children. Afterward, the member became indebted to the society in a large sum of money, and assigned his policy to it as collateral security for the debt. In an action on the policy by the children, it was held that this assignment was void, as being in violation of the charter of the society, and in contravention of the sole objects and benevolent purposes for which it was organized.² A statute authorized the formation of societies for the purpose of rendering assistance to the widows, orphans, or other dependents of deceased members. A member of a society organized under this act took out a certificate payable to his wife. Afterward he and his wife together executed and delivered to a creditor, as collateral security for certain debts, an assignment of all their right, title

18 Kan. 93; 26 Am. Rep. 761. Many fund to such purchaser, no stranger of the cases just cited are reviewed or volunteer can assail the validity of in *Mutual Life Insurance Co. v. Allen*, 138 Mass. 24; *Price v. Supreme Lodge*, 68 Texas, 306; 4 S. W. Rep. the payment, even though the sale be against public policy.

633; *Schonfield v. Turner*, 75 Texas, 634; 12 S. W. Rep. 626. Where the *Stoelker v. Thornton*, 88 Ala. 241; 6 Southern Rep. 680; see *Jackson v. Anderson* (Ky.), 3 S. W. Rep. 326.

society recognizes the validity of an assignment by issuing a new certificate, in which the purchaser is named ¹ *Bayse v. Adams*, 81 Ky. 368; §§ 13, 20, 158, 159.

as the beneficiary, and, upon the death of the assured pays the benefit ² *Dietrich v. Madison Relief Ass'n*, 45 Wis. 79.

and interest in this certificate. The court held that the assignment was contrary to the charter and invalid.¹

Where, by the terms of the charter of a society, the benefit fund was payable to the "legal heirs or beneficiary of a deceased member," and a member had designated a beneficiary, and afterward, for an existing debt and a certain sum in cash, had assigned the certificate, it was held that the assignee was not entitled to the fund, for whatever right or interest he acquired, if any, he took by virtue of the contract of assignment, and not as a designated beneficiary.²

§ 166. The statute under which a society was organized, provided for the formation of corporations for the purpose of furnishing "life indemnity or pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees of deceased members," and its constitution provided that a member might change his beneficiary at pleasure without the latter's consent. It was held that, as a creditor was capable of becoming a beneficiary as legatee of the member, an assignment of the certificate by the member in his lifetime to the creditor as security for the debt was, under the contract, valid and binding upon both the beneficiary and the society."³ In *Lamont v. Associa-*

¹ *Briggs v. Earl*, 139 Mass. 473; 1 N. East. Rep. 847. But after the death of the member the right of the beneficiary to the fund raised by an assessment upon the surviving members becomes vested, and the fund is subject to his absolute disposal; and where the beneficiary, who is also the widow of the deceased member, asserts the validity of an assignment made by him in his lifetime as collateral security for a loan, the association can not defend an action brought against it by the assignee on the ground that the statute under which it was incorporated, strictly limits its purposes to giving aid to widows and orphans of deceased members, or other persons dependent on them for support, and renders void all assignments made during the lifetime of the member to creditors or

other persons not within the purposes of the statute. *Aiken v. Association*, 13 N. Y. Supp. 579; see §§ 169, 171.

² *Basye v. Adams*, 81 Ky. 368.

³ *Martin v. Stubbings*, 126 Ill. 387; 18 N. East. Rep. 657. In *Bloomington Mutual v. Blue*, 120 Ill. 121, the controversy was between the society and the beneficiary named in the certificate. The society denied its liability on the ground that the beneficiary named was not within the classes enumerated in its organic law. In the case just cited the society admitted its liability, and the controversy over the fund was between the widow, who was the designated beneficiary, and the assignee, who was the creditor of the deceased member. Under the authority of *Bloomington Mutual v. Blue*, *supra*, the creditor was a proper beneficiary,

tion, the court held that where the articles of association and by-laws of a society organized under the same statute above quoted, make the benefits payable to the person designated

and as no manner or mode of changing the beneficiary was specified in the contract in this case, the member had a right to make the change in any manner he chose. See § 214. In *Martin v. Stubbings*, *supra*, the court said: "It is clear that the statute, by empowering a member to name as his beneficiary his legatee or devisee, without restriction, proceeds upon a policy much broader than do those statutes which limit the benefits to accrue upon the death of the member to his relatives or those in some way dependent upon him. Under the name of legatee or devisee the member is given the power to appoint as his beneficiary any person, however related to him, or not related to him at all. He may, in the selection of his beneficiary, be governed by considerations of affection or duty, or he may yield to the dictates of mere caprice, subject only to the limitation that the appointment be made by will. The legislature having thus enlarged the category of those capable of being selected as beneficiaries so as to include all persons whom the member may see fit to select as his legatees or devisees, we can perceive no substantial rule of public policy which would be violated by the adoption of a different mode of selection of a beneficiary. No substantial rights of any party are better secured or protected by one mode of appointment than by another. The mode of selection is mere matter of form and does not go to the substance of the right to select beneficiaries. We are aware that upon the general proposition we are discussing the decisions of the courts are not altogether harmonious, and that

some courts of high respectability have reached a different conclusion. Those decisions, however, so far as we have been able to examine them, seem to be based upon statutes essentially different from ours. Thus *Briggs v. Earl*, 130 Mass. 473, was a case arising under a membership certificate where the purposes for which the society could be formed were strictly limited by statute to rendering assistance to the widows and orphans of deceased members and the persons dependent upon them. It was there held that an assignment of the membership certificate as security for a debt was invalid. In *Dietrich v. Association*, 45 Wis. 79, the charter of the association declared that its business should be to afford relief to the widows and children of deceased members, and that to such business it should be limited and restricted; and it was held that an assignment by a member of his membership certificate to the association, to secure a debt which he owed to it, was void, by reason of the want of authority in the association to take it. Authorities of the class to which the foregoing belong manifestly have no application here. The assignment of the certificate of membership to a creditor is not within the strict letter of the statute; but, in the absence of all negative words forbidding the appointment of a beneficiary in any other mode than the one prescribed, the assignment to him is not necessarily unlawful and therefore void. He was a person capable under the statute of becoming a beneficiary, and the absolute right of naming him as such was in the member. His failure to adopt the mode prescribed

by the member in his application for membership, or in his last will and testament, it is competent for such member by his own act, and with the consent of the society, at any time before his death, without the formalities of a will, to make a transfer and assignment of the benefit fund from the original beneficiary named to any other person he may select.¹

§ 167. **Equitable assignment.**—Where, under the contract, the member may assign his certificate, a parol assignment accompanied by delivery, will vest in the assignee an equitable right, at least, to the fund. Assignments of written contracts are usually made in writing, but a merely verbal assignment and delivery gives to the assignee an equitable right, when the contract contains no provision to the contrary. An assignment need not be in writing or in any particular form of words, if a consideration or an executed gift is proved, and the meaning of the parties appears.² But the intention of the member to clothe the assignee with his rights in the contract must clearly appear in such a case.³ It was held that there was an equitable assignment of the certificate in the following case: A member of a society was insured in the sum of

by the statute,—that is, by executing a will making his creditor his legatee,—was doubtless a matter to which the society could probably object; but the beneficiary named had no rights in the certificate which would justify her in interposing an objection. She was to all intents and purposes a stranger to the transaction. Her rights could arise only upon the death of the member, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place. The power of designating his beneficiaries being wholly under his control, he had the power of determining who should not, as well as who should, be such beneficiaries. In making the assignment of the certificate to the creditor, he appointed him to receive the benefit to accrue at his death to the extent of the debt due him, and by the same

act he revoked the appointment of Mrs. Martin as a beneficiary to the same extent. She, being no longer a beneficiary, has no interest which can give her a standing to contest the validity of the assignment to the creditor; and the society having recognized the validity of said assignment, and professed a willingness to pay the money to him, there was no error of which Mrs. Martin can complain in the decree of the court ordering such payment to be made."

¹ 30 Fed. Rep. 817; see *Bloomington Mutual v. Blue*, 120 Ill. 121; see §§ 178, 235.

² *Scott v. Dickson*, 108 Pa. St. 6; *Chapman v. McIlwraith*, 77 Mo. 38; *St. John v. Ins. Co.*, 13 N. Y. 31; *Marcus v. Ins. Co.*, 68 N. Y. 625; *May on Insurance*, §§ 389, 395.

³ *Palmer v. Merrill*, 6 Cush. (Mass.) 282; see § 214.

\$2,500. The by-laws provided that this sum might be disposed of by will, and if not so disposed of, should belong to and be paid to his widow, or in case he had no widow, then to his legal heirs or representatives. The member by his will gave the fund to his two daughters, and this will remained in existence unrevoked at the time of his death. About five months before his death, he wrote to his wife, telling her that assessments upon his certificate were due, in the amount of \$38, and that if she would pay the assessments and keep them paid up, the policy should be hers. In the letter he enclosed the following writing: "San Diego, Cal., Dec. 11, 1877. Know all men by these presents, that this is my wish, made in sound mind, that I revoke all former life insurance policies, and do this day, Dec. 11, 1877, make my policy of the Conductor's Life and Benefit Association read for the benefit of Mrs. M. A. Swift in case of my death, and for her special benefit all that may be derived therefrom. Clark Swift." Upon the receipt of this, Mrs. M. A. Swift, his wife, paid up the assessments, and soon afterward the member died. The court held that these writings, in connection with the action of his wife, accomplished a transfer or assignment to his wife of all interest in the contract of insurance.¹

A member who has received a certificate payable to his heirs,

¹ Swift v. Association, 96 Ill. 309. Mulkey, J., dissented from the reasoning and conclusion of the opinion, and placed his decision on very tenable grounds. The fund did not belong to the member. He could control its direction in the method, and to the extent provided in the by-laws. He had designated his children as his beneficiaries, and they had a right to the fund at his death, unless he had made a change in accordance with the contract of insurance. He could have made his wife his beneficiary by later testamentary appointment, or by merely revoking his will and leaving the beneficiary to be designated by the by-law above referred to, but under the contract he had no interest or estate in it, or in the fund, to be paid at his death, and had no power to appoint a beneficiary in any other manner than that specified in the by-laws. The payment by her of assessments, though made in good faith, gave her no title to the contract of insurance. De Jonge v. Goldsmith, 86 N. Y. 614. The advancement of assessments under the circumstances gave to the wife an equitable lien on the fund for the amount paid by her, but she was entitled to nothing more. Dutton v. Willner, 52 N. Y. 312; National Mutual v. Lupold, 101 Pa. St. 111; Meier v. Meier, 15 Mo. App. 68; Weisert v. Muehl, 81 Ky. 336; Unity Mutual v. Dugan, 118 Mass. 219; Price v. Supreme Lodge, 68 Texas 361; 4 S. W. Rep. 633; Conn. Ins. Co. v. Burroughs, 34 Conn. 305.

administrators or executors, may assign it by parol to the mother of his illegitimate child, for its support.¹ A husband may make a gift to his wife of an insurance policy payable to himself, by delivery of the possession thereof, accompanied by such language as indicates an intention to part not only with his possession, but also with his property in the policy, but, as has been said, the intention to clothe her with his rights in the contract must clearly appear. The holder of an accident ticket payable to himself, as he was leaving home for a journey, laid it on the table in front of his wife, saying to her that "she should take it and take care of it, and if he got killed before he got back, she would be that much better off—three thousand dollars better off." He was accidentally killed the next day, and his wife claimed the insurance money, which had been paid to the administrator of his estate. But the court held that these facts were insufficient to establish a gift of the ticket to his wife, as against the creditors of his estate; that in order to establish such a gift, it was necessary to prove that he had intended to part with both the possession of and his property in the ticket.²

§ 168. **Limitation on the right to assign.**—Where, by the charter of a society the benefit fund is payable to the assigns of the member, no limitation or condition may be placed upon the right of the member to assign his certificate.³ But a by-law of such a society is not inconsistent with the charter, which provides that such an assignment, in order to be valid, shall be recorded in the books of the society. This is not a limitation upon the right to assign; it is a reasonable provision for the protection of the society, and relates merely to the manner of the assignment.⁴ Where the charter is silent as to the assignment of a certificate, the society may provide in its by-laws or certificate for its assignment to proper beneficiaries, and may place upon its assignment such limitations and conditions as it may deem proper.

¹ Brown v. Mansur, 64 N. H. 39; 5 Atl. Rep. 768; 2 N. Eng. Rep. 857. ³ Raub v. Masonic Mutual Relief Association, 3 Mackey (D. C.), 68; see

² Williams' Appeal, 106 Pa. St. 116; §§ 13, 20, 158, 159.

Linsinbiger v. Gourley, 6 P. F. Smith, 166; Crawford's Appeal, 11 P. F. Smith, 52; Trough's Estate, 25

P. F. Smith, 115. ⁴ Coleman v. Knights of Honor, 18 Mo. App. 189.

§ 169. **The consent and approval of the society may be required.**—A society may provide that its contract of insurance may be assigned and transferred only with the consent of the society indorsed thereon. In some cases it is held that one to whom such a contract has been assigned without such indorsement can not maintain an action against the society, after the death of the insured.¹ A society issued a benefit certificate which provided that no assignment thereof should be valid unless approved by the secretary of the society. The member assigned it without such approval, and the court held the assignment invalid.² The right of the contracting parties to thus prohibit an assignment of the certificate without the consent of the society, can not be seriously doubted; and in view of the restricted nature of mutual benefit insurance, the propriety, if not the necessity, of such a condition is equally clear. The personal character of each holder of a certificate, and the interest he may have in the life of the person thereby insured, are essential elements in the contract of mutual indemnity. The obvious tendency of an unrestricted right to transfer would be to create interests directly hostile to those of the regular membership. It is, therefore, clear that the condition is an essential feature of the contract, and the society has a right to insist on the benefit of the protection which the condition was intended to afford it.³ It has also been held that if the contract of insurance contains a clause declaring that it may be assigned only on the written approval of the society, but does not declare that a violation of the provision shall avoid the contract, such a violation does not involve a forfeiture, and an assignee may enforce the contract, although the society has not consented to the assignment.⁴ A clause in a certificate, providing for its forfeiture if assigned without the consent of the society, applies only to an assignment before the death of the member, and can not prevent an assignment by the beneficiary of the benefit fund after his death.⁵

¹ *National Mutual v. Lupold*, 101 97; *N. Y. Ins. Co. v. Flack*, 3 Md. Pa. St. 111; *Ins. Co. v. Watson*, 30 341; *Risley's Succession*, 11 Rob. (La.) Fed. Rep. 653; *Ins. Co. v. Hamilton*, 298.

² *Sneed (Tenn.)* 269; *Moise v. Mutual Reserve*, 45 La. Ann.; 13 So. Rep. 170.

³ *National Mutual v. Lupold*, *supra*.

⁴ *Marcus v. Ins. Co.*, 68 N. Y. 625.

⁵ *Roger Williams Ins. Co. v. Car-*

² *Harmon v. Lewis*, 24 Fed. Rep. 43; *rington*, 43 Mich. 252; *Dogge v. Ins.*

Such a clause may be waived by the society, and the declarations and acts of its agents are competent as evidence of a waiver.¹ The mere written receipt of the society, given to one who is in fact the assignee of a certificate, for the payment by him of an assessment after the death of the member, is not, of itself, evidence that the society had recognized him as the assignee of the certificate and had waived such a provision.² Where the certificate provides that it may not be assigned without the consent of the society, the society alone may object to the want of consent and approval of an assignment. If it recognizes the equitable right of the assignee, the beneficiary can not insist upon an objection which the society has waived, and the proceeds of the policy must be distributed according to the equities of the parties.³

§ 170. **Rights of the assignee of a certificate.**—A person accepting by assignment from a member a certificate of membership in a mutual benefit society, is bound by the provisions and conditions of the constitution and by-laws of the society relating to the contract of insurance; and this is especially true when the constitution and by-laws are made a part of the certificate by its express terms.⁴ When the society has consented to the assignment of the contract of insurance it becomes in substance a new and binding contract with the assignee on the basis of the old one. A void contract is not rendered valid by a mere assignment approved by the society. Such an assignment and approval do not create any new rights, but simply transfer subsisting ones. If the society, when it consents to the transfer, is aware of the invalidity of the contract, that fact may be shown as evidence of a waiver of its invalidity, but assent to an assignment, given in ignorance of the truth, can not be regarded as affecting the society adversely.⁵ When the assent of a society has been fairly pro-

Co., 49 Wis. 501; *Combs v. Ins. Co.*, 32 N. J. Eq. 512; *Aiken v. Association*, 13 N. Y. Supp. 579; see note to § 165.

¹ *Pierce v. Ins. Co.*, 50 N. H. 297.

² *National Mutual v. Lupold*, *supra*.

³ *Brown v. Mansur*, 64 N. H. 39; 5 Atl. Rep. 768; see *Diffenbach v. Vogeler*, 61 Md. 370.

⁴ *Miller v. Assurance Association*, 42 N. J. Eq. 459; 7 Atl. Rep. 895; *Ins. Co. v. Garland*, 108 Ill. 220; 9 Ill. App. 571.

⁵ *Eastman v. Ins. Co.*, 45 Me. 307.

Merrill v. Ins. Co., 48 Me. 285.

cured and unreservedly given to an assignment of a certificate it may not be withdrawn against the will of the assignee.¹ A stipulation in a policy payable to one or his assigns, providing that a claim "by an assignee shall be subject to proof of interest," does not apply to one who holds it as collateral security for a debt, since the assignee is a mere trustee for the debtor, and must account for any surplus proceeds after paying the debt and it is not necessary for such assignee to allege that he had an insurable interest in the life of insured.²

§ 171. **Right to assign the benefit fund after the death of the member.**—After the death of the member, when the right to the fund has become absolute in the beneficiary, this right may be assigned as any other chose in action.³ Provisions of the charter restricting the classes who may become beneficiaries of the society do not apply after the right to the fund has vested in the beneficiary by the death of the member.⁴

§ 172. **Assignment of the certificate by the beneficiary.**—The beneficiary in an ordinary life insurance policy has a vested interest which may, generally speaking, be assigned by him, with the concurrence of all parties interested, so as to vest in his assignee the same substantial rights which he possessed in the contract. A large part of the law on the subject of the assignment of insurance policies has arisen from assignments made by beneficiaries. But, according to the general plan of mutual benefit insurance, the beneficiary has no vested right in the contract or the benefit fund.⁵ The right of the beneficiary to take the fund is dependent upon his surviving the member while the designation is unchanged, and, in case of the prior decease of the beneficiary, no interest in the fund passes to his estate on the subsequent death of the member.⁶ His interest, during the lifetime of the member, is a mere expectancy, not property, and its value as the subject of an assignment would

¹ Grant v. Ins. Co., 75 Me. 196.

² Curtiss v. Ins. Co. (Cal.), 27 Pac. Rep. 211.

³ Roger Williams Ins. Co. v. Carrington, 43 Mich. 252; Dogge v. Ins. Co., 49 Wis. 501; Greene v. Ins. Co., 84 N. Y. 572; Combs v. Ins. Co., 32 N. J. Eq. 512.

⁴ Briggs v. Earl, 139 Mass. 473; 1 N. East. Rep. 847; Aiken v. Association, 13 N. Y. Supp. 579; see § 165 note, § 169.

⁵ See §§ 212, 213.

⁶ See § 202.

be speculative and uncertain. It is very doubtful whether the mere consent of a member that his beneficiary might assign his interest in the contract of insurance would estop the member from afterward changing the designation of his beneficiary.

§ 173. **The designation of a new beneficiary is not an assignment of the certificate.**—Where the charter, by-law or certificate of membership provides that the member may change his beneficiaries by the indorsement of their names upon the certificate, a direction by the member, written on the back of his certificate, that the fund shall be paid to a certain person, is to be regarded as a designation of a beneficiary, and not as an assignment of the certificate.¹ And where a certificate of membership in a mutual benefit society is made payable to the member himself, and there is no provision in the contract specifying how he may change his beneficiary, an indorsement on the certificate showing that he desires the benefit fund when collected to be distributed among certain beneficiaries, is not an assignment of the certificate, but is a change of beneficiaries which the member has a right to make, from the very nature of the contract.² An assignment is the transfer by one of his right or estate in property to another. It rests upon contract, and generally speaking, the delivery of the thing assigned is necessary to its validity.³ But in such cases as have just been mentioned, the delivery of the certificate to the persons named is not necessary to give them the right to take the fund. This right does not rest upon contract, but upon the direction for the payment of the benefit fund.⁴ A member may have no right or estate in the benefit fund, which he can assign, but he may, nevertheless, have the power to appoint a beneficiary to take the fund. This power of appointment of a new beneficiary, or right to dispose of the fund, may be exercised in any manner agreed upon in the contract of insurance.

¹ *Highland v. Highland*, 109 Ill. 366; see § 149. 108 Pa. St. 6; In the matter of Webb, 49 Cal. 541. Notice by the assignee

² *St. Clair Co. Ben. Soc. v. Fiet-sam*, 97 Ill. 474; *Milner v. Bowman*, 119 Ind. 448; 21 N. East. Rep. 1094; see §§ 212, 214. or the assignor to the company that an insurance policy has been assigned, may be sufficient to transfer the title. *In re Styan*, 1 Phillips' Ch.

³ *Palmer v. Merrill*, 6 Cush. (Mass.) 282; *Dexter Savings Bank v. Cope-land*, 77 Me. 263; *Scott v. Dickson*, 105; *Chowne v. Baylis*, 31 Beav. 351. ⁴ *Highland v. Highland*, *supra*; *St. Clair, etc., Soc. v. Fiet-sam*, *supra*.

If the contract provides that it may be done by an assignment of the certificate, it may so be done, but, in assigning the certificate, the member does not transfer his right or estate in the certificate or the fund to his beneficiary; he executes a power. He does not really assign the certificate; he changes and designates his beneficiary. This distinction is of prime importance, for any words, or even some acts, which show the intent of the parties to make a complete transfer will work an assignment, but the power of appointment must be exercised as such, and the right to change the beneficiary must be exercised in the manner agreed upon in the contract of insurance, if that contract limits that right and prescribes a certain mode in which the change shall be made.

§ 174. **Law governing the validity of an assignment.**—The assignability of a contract is governed by the law of the place where it was made and is to be performed. If it is assignable, an assignment, being incidental and collateral to the original contract, is governed by the law of the place where it was made. If an assignment of a contract of insurance is valid or void where it was made, it is valid or void everywhere.¹

¹ Lee v. Ardy, L. R., 17 Q. B. Div. Ontario Rep. 442; Conn. Mutual v. 309; Newcomb v. Ins. Co., 9 Ins. L. Westervelt, 52 Conn. 586; Mutual J. 124; Toronto Ins. Co. v. Sewell, 17 Benefit v. Bank, 68 Mich. 116.

CHAPTER XII.

CONSTRUCTION OF THE DESIGNATION OF THE BENEFICIARY.

- § 175. Rules of construction.
- 176. Provisions of the charter designating beneficiaries.
- 177. Beneficiaries designated by the by-laws or certificate.
- 178. Devisees; as designated in last will.
- 179-183. Wife, widow.
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- 185. Wife and children.
- 186. Child.
- 187. Children born after issue of certificate.
- 188. Child, grandchild.
- 189-192. Heirs, heirs at law, legal heirs.
- 193. Orphans.
- 194. Family.
- 195. Dependents.
- 196. Relations, relatives.
- 197. Legal representatives.
- 198. The assured.
- 199. "Guardian" of member.

§ 175. **Rules of construction.**—It is well settled that in construing the terms in which the beneficiary of a contract of mutual benefit insurance has been designated, a liberal, rather than a restricted meaning should be given to the language or word employed. Where there is no fixed, legal or technical meaning which the court must follow in the construction of a term of a contract, the best construction is that which is made by viewing that term as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. The result thus obtained is exactly what is obtained from the cardinal rule of intention.¹ Where, under the contract, certain classes of persons only may take the fund, a broad and liberal meaning should be given to the words in which the classes are specified.

¹ Navigation Co. v. Moore, 2 Whart. 491.

§ 176. **Provisions of the charter designating beneficiaries.**—In contracts of mutual benefit insurance the person or persons who are to be paid on the death of the member are often not designated by name, but are described in the charter or by-laws of the society as a class, or as one of a class, of persons who are to be entitled to the benefit fund. In such cases parol evidence is admissible to show that the person suing is the one intended by the parties to be paid.¹

It is customary for mutual benefit societies to provide in their charters, by-laws, or certificates of membership how the benefit fund shall be disposed of, in case no designation shall have been made by the member, or in case the designated beneficiary shall have died, or shall be from any cause incapable of taking the fund. These provisions are a part of the contract of insurance, and in construing the meaning of a designation made by a member, or in seeking to determine who is entitled to the benefit fund, they must often be looked to as an important element of the question. A member was at the time of his death in good standing in a society, the object of which was, as declared by its charter, "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws, if a deceased member had no *legal representatives*, the fund should become the property of the society. He had named his first wife as the beneficiary of his certificate, and she died. He married again, and died intestate, without children, leaving his second wife. He never made another designation of a beneficiary after he took out his certificate. Three separate claims were made to the fund; first, by the representatives of the first wife; second, by the representatives of the husband; third, by the surviving widow. Thereupon the society filed a bill of interpleader, making these parties defendants that they might establish their several claims to the fund. The court held that the representatives of the first wife were

¹A contract of mutual benefit insurance which does not name the beneficiary, but provides for the payment of the fund on the death of the member to a certain class of persons, is not a contract in writing, in applying the statutes of limitation, since
Way Association v. Loomis, 142 Ill. 560; *Kanz v. Great Council*, 13 Mo. App. 341; *Baker v. Johnson Co.*, 33 Iowa 151; *Works v. Macalister*, 40 Mich. 84.

not entitled to the fund.¹ And it was held that the term *legal representatives* in the by-law, providing that "if a member has no legal representatives, such sum of money as they would have been entitled to shall become the property of the association," is to be taken as meaning those who are legal representatives in the contemplation of the charter and by-laws, to-wit, the persons named, "the widow, orphans, heir or legatee." The court said: "The fund is to go to some one of these parties. They are mentioned disjunctively; the money is to be paid to the widow, or the orphans, or the heir, or the assignee or legatee. Now, that means one of two things; either that it shall go to some one of these, to be selected by some authority, or else that they are to have precedence in the order in which they are named. But there is no authority provided for or indicated, in either the charter or the by-laws, by whom any one of these beneficiaries shall be selected; and, therefore, our conclusion is that the order in which they are named is the order in which they are to benefit by this fund; first the widow; if there is no widow, then the orphans; if there is no orphan, then the heir, etc. In this case the question is between the widow and the personal representatives. The latter are excluded entirely by our construction of the by-laws, and, therefore, the decree will be that the widow shall take the fund."² Where the charter of a mutual benefit society provides that the benefit fund shall upon the death of a member be paid to his widow and children, they are entitled to the fund, although another person is named in the certificate of membership as the beneficiary, and has paid all the assessments levied upon the member. The certificate must, in such a case, be construed in connection with the charter as a contract to pay to the widow and children of the member the amount of the insurance. If, for instance, a certificate in such a society is made payable to a creditor of the member, it is not void, but, the designation in the certificate alone being void, there remains a valid and subsisting contract of insurance, under the terms of the charter, in favor of the widow and

¹ See § 202.

Rep. 710; Jewell v. Grand Lodge, 41

² *Masonic Mutual v. McAuley*, 2 Minn. 504; 43 N. W. Rep. 88; *Riley Mackey* (D. C.) 70; see *Rockhold v. v. Riley*, 75 Wis. 464; 44 N. W. Rep. Association, 129 Ill. 440; 19 N. East. 112.

children of the member.¹ The charter of a society provided: "Upon the decease of any member of this association, the fund to which his family is entitled shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go—first, to the widow and infant children," etc. A member designated, as his beneficiary, his brother, who afterward died on March 7, 1880. The member died May 26, 1880, intestate and childless. His widow and not his administrator was entitled to the benefit fund.²

The object of a society was "to establish a widows' and orphans' fund" for the payment of a certain sum on the death of a member "to his family and those dependent upon him, as he may direct." A by-law provided that in case a member fails to direct, "by will, entry or benefit certificate," who shall receive such benefit, "the council shall cause the same to be paid to the person or persons entitled thereto." A member designated his children as beneficiaries. They died a short time before the father, and he gave no other direction, and left no children or other persons dependent upon him for support, except his widow; and the court held that the widow was entitled to the benefit fund.³ Where the charter of a mutual benefit society provides for the payment to the member's family or his appointee, of a certain sum of money upon the member's death, and that, "in case no direction is made by a brother, the same shall be paid to the person or persons entitled thereto," upon the death of a member, without having named a beneficiary, the benefits are payable to the wife and children, and not to the administrator of the deceased member.⁴

Where the charter of a mutual benefit society provides that the fund due upon the death of a member shall be paid to his widow and children, and only gives the member the power to designate by will in what proportion it shall be divided between them, there can be no assignment of a certificate or

¹ Ky. Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. L. Rep. (Sup'r Ct.) 550; Gibson v. Ky. Grangers' Mut. Ben. Soc., 8 Ky. L. Rep. (Sup'r Ct.) 520; see Rindge v. N. E. Mutual Aid Society, 146 Mass. 286; 15 N. East. Rep. 628.

² Van Bibber's Adm'r v. Van Bibber, 82 Ky. 347, affirming 5 Ky. Law Rep. 182.

³ Ballou v. Gile, Adm'r, 50 Wis. 614.

⁴ Fenn v. Lewis, 81 Mo. 259; affirming 10 Mo. App. 478.

change in the beneficiary which will divest the widow and children of their rights.¹ In the absence of a valid designation of a beneficiary, the proceeds will be disposed of according to the charter of the society as if no designation had been made.²

A society was incorporated under a statute, "to aid, assist and support members or their families in case of want, sickness or death," which statute authorized it to create, manage and disburse a fund sufficient to pay all losses and expenses incident to the corporation, for the relief of members and their families, under such conditions and regulations as might be adopted by the grand lodge; and it was provided that such fund might be set apart "to be paid over to the families, heirs or legal representatives of deceased or disabled members, or to such person or persons as such deceased member may, while living, have directed; and the collecting, managing and disbursement of the same, as well as the person or persons to whom, and the manner and time in which, the same shall be paid on the death of a member, shall be regulated and controlled by the rules and by-laws of the said grand lodge." The only by-law adopted by the society relating to this subject provided that each member of the order should be entitled to a mutual aid certificate, which should set forth the name and good standing of the member, the amount of benefit to be paid at death, and to whom payable, and that such certificate should represent \$2,000. In an action against the society for the amount of the benefit fund, on account of the death of a member, it did not appear that any certificate provided for by the by-laws above referred to was ever issued to the deceased member. The trial court and court in general term held that the issuing of such a certificate was a condition precedent to the liability of the society to pay the fund, and that the lack of such certificate was fatal to the plaintiff's action.³ But the court of appeals held that those who were to receive the fund were, by the very terms of the act of incorporation, to be the families, heirs or legal representatives of deceased or disabled members, or such other person as the deceased member

¹ Ky. Grangers' Mut. Ben. Soc. v. 26 N. East. Rep. 443; Arthurs v. Baird, Howe, 9 Ky. Law Rep. (Supr. Ct.) 8 Pa. Co. 67; Shea v. Association, 198. 176 Mass. 289; 35 N. East. Rep. 855.

² Park v. Welch, 33 Ill. App. 188; ³ Bishop, Adm'r's, v. Grand Lodge, Burns v. Grand Lodge, 153 Mass. 173; 43 Hun 472.

might, while living, have directed, and that in case no such direction was given, such payment was intended to be made to his family, heirs or legal representatives. "It is true," said the court, "the act and the constitution fail to state which it shall be in case no direction is given, whether it shall be the family, the heirs, or legal representatives; but we think this expression should be construed with reference to the general purpose of the corporation, and, having such purpose in view, we think it really was meant, and that it should be held, to include those who would take such property as in cases of intestacy."¹

§ 177. **Beneficiaries designated by the by-laws or certificate.**—Where, by the laws of a society, the benefit fund is to be paid "to the widow, children, mother, sister, father or brother of a deceased member, and in the order named, if not otherwise directed by the member previous to his death," the relatives will take the fund in the order named, unless the member in his lifetime executed the power of direction, thus changing the order of payment.² By the provisions of the by-laws of a society, a member in good standing might surrender his certificate and have a new one issued, payable to such beneficiaries dependent upon him as he might direct, and, in the event of the death of the beneficiary named, and no other disposition being made, the benefit was to go to the dependent heirs of the deceased member. An insured member died. He left a will bequeathing the benefit fund to a person to whom he was engaged to be married, but to whose support he had contributed nothing, and who was not dependent upon him. He died without marrying this person, and left his mother, who was dependent upon him, as his next of kin. It was held under these facts that the disposal of the fund by will being invalid, the mother was entitled to it.³ In *McClure v. Johnson*,⁴ the benefit fund was made payable to the "wife, husband, children, mother, sister, father or brother of such deceased member, and in the order above named," by the provisions of a by-law of the society, and there was no provision of the con-

¹ *Bishop v. Grand Lodge*, 112 N. Y. 627; 20 N. East. Rep. 562, reversing 140 Mass. 580.

43 Hun 472.

⁴ 56 Iowa 620.

² *Arthur v. Association*, 29 O. St. 557.

tract of insurance, authorizing any other disposition of the fund. A member left a will by which he directed that the fund should be paid to a creditor, but the court held that he had no right to change the beneficiary, and that under this by-law his widow was entitled to the fund. Where the by-laws provide that each member shall designate in writing some person as nominee for the benefit fund, and that upon the death of a member the nominee so designated by him shall receive such fund, the society is liable only to the nominee of the deceased member, and where there is no nominee there is no liability.¹ Where the by-laws name a class of persons who shall take the fund in case the member selects and appoints no one to take it, the rights of the persons named in the by-laws are not affected by an illegal or ineffectual designation of a beneficiary by the member.²

Where the appointment of a beneficiary is revoked by his death prior to the death of a member,³ and no other designation is made, the by-laws often control the direction of the benefit fund.⁴

By the provisions of a by-law of a mutual benefit society, at the death of a member the sum of twenty-five dollars was to be paid to his widow or relatives to provide for his decent interment. The widow of a deceased member, who at the time of his death, and for years previously, had not been living with him, and had incurred no expense toward his interment, brought an action to recover this stipulated sum, and was met by an offer of the society to show that the amount had already been paid to decedent's son-in-law, at whose house he had died, and who had paid all the expenses of his funeral. The court held that the offer should have been received, and that being separated from her husband in pursuance of a mutual understanding and not by reason of coercion or ill-treatment, living apart from him at the time of his death,

¹ Order of Mutual Companions v. Griest, 76 Cal. 494; 18 Pac. Rep. 652.

² Arthur v. Odd Fellows, *supra*; Supreme Council v. Perry, *supra*; Britton v. Supreme Council, 46 N. J. Eq. 102; 18 Atl. Rep. 675; Park v. Welch, 33 Ill. App. 188; Palmer v. Welch, 132 Ill. 441; 23 N. East. Rep. 412.

³ See § 202.

⁴ Riley v. Riley, 75 Wis. 464; 44 N. W. Rep. 112; Given v. Odd Fellows, 71 Wis. 547; 37 N. W. Rep. 817; see § 182.

and having borne no part of the funeral expenses, the widow was not entitled to the bounty of the society.¹ A society may waive the provisions of its by-laws or of its constitution relating to the persons who may become beneficiaries.²

§ 178. **Devisees; "as designated in last will."**—The charter of a mutual benefit society provided in its sixth section that upon the decease of any member of the association "the fund to which his family is entitled shall be paid as may be designated in the application for membership. This being changed by death or otherwise impossible, it shall go, first, to the widow and infant children," and afterward in the order named. A member directed in his application that the benefit should be paid at his death as he might designate in his will. He died intestate, leaving a widow, but no infant children. The court held that the widow was entitled to the fund, and in so deciding said: "Appellants contend that this section (above quoted) applies only where a designation is made, and subsequent events render it impossible of fulfillment. But we think it has a broader and more comprehensive meaning, and that it applies as well where, by reason of the failure of the insured to make any designation at all, it becomes impossible to pay according to his direction, as in case of the death of a designated beneficiary; for, according to what seems to us the true construction of the language used, it is only in those cases where, pursuant to the charter, the insured has expressly directed otherwise, that the fund is not payable as pointed out by the terms of the sixth section."³ A society issued a certificate of membership, and agreed therein that on the death of the member in good standing it would cause an assessment to be made upon its members, and would pay the proceeds of such assessment, not exceeding \$2,500, "as a benefit to his devisees, as provided in his last will and testament, or in the event of their prior death, to the legal heirs or devisees of the holders of this certificate." The member died in good standing and intestate. The court,⁴ in construing this contract, said: "The insured might die intestate. It could not have

¹ Berlin Beneficial Society v. March, 82 Pa. St. 166.

³ Whitehurst v. Whitehurst, 83 Va. 153; 1 S. E. Rep. 801.

² Johnson v. Supreme Lodge, 53 Ark. 255.

⁴ Judge Dyer, U. S. Cir. Ct., E. D. Wisconsin.

been in contemplation of the parties that, in that event, there was to be no beneficiary entitled to sue upon the contract. The certificate, fairly and reasonably construed, means, we think, that if the insured should choose to make a last will in which devisees should be named, then such devisees were to become the beneficiaries entitled to receive and recover the sum collected by assessment on account of the certificate. But no obligation was imposed upon the insured to make a last will. He might, if he chose, leave his estate to be divided among legal heirs as the law should direct its division, and, in that event, as no devisees would exist, the benefits of the certificate would accrue to the heirs. In other words, the effect of the contract is that if the insured has made no will, and if, therefore, no devisees are in existence, his legal heirs shall become the beneficiaries entitled to enforce payment in a suit upon the certificate. This view of the rights of the parties accords with the sense and meaning of the contract.”¹

A mutual benefit society issued a certificate of membership in which it agreed to pay, or cause to be paid “as a benefit to the member’s devisees, as provided in his last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate holder” the amount derived from an assessment upon its members. In construing this contract the court said: “The substantial promise was to pay to devisees, if there were devisees to take, and, if not, then to pay to heirs. We think this the fair and reasonable construction of the agreement, which, in view of the purpose of the association, may well be adopted.”²

A certificate of insurance was issued by a society organized under the laws of Illinois for the purpose of securing “pecuniary benefits to the widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees of deceased members,” and was made payable “to the devisees of Philip H. Worley.” Worley died intestate, and suit was brought on the certificate by the administrator of Worley’s estate. So far as appears from the reported case, no provision was made by the society, designating a beneficiary in case the member

¹Smith v. Covenant Mutual, 24 Fed. Rep. 685; see Newman v. Association, 76 Iowa 56.

²Covenant Mutual v. Sears, 114 Ill. 108; see Newman v. Association, 76 Iowa 56.

should fail to make a designation—except as the express purpose of the law above quoted might be construed into such a provision. The court¹ held that the certificate was not a part of the assets of the estate, and not recoverable as such by his administrator. Expressions in the opinion of the court indicate that, in the view taken of the case, no recovery could be had upon the certificate. It was there said that neither the decedent nor the defendant corporation intended by their contract to provide for the widows, orphans, heirs or creditors of the decedent, but only for his devisees, and, as there were no devisees, there was no beneficiary in existence who could enforce the contract—that, as in no contingency was the insurance to be paid to any other persons than devisees, the expression of one thing excludes other and different things; that the designation of devisees in the contract excluded the other classes—the widow, orphans, heirs and creditors.²

It was held in one case that where the law provides for the organization of societies to “secure pecuniary aid to the widows, orphans, heirs and devisees of deceased members,” the member may not by will make the fund payable to his executor; that the executor is not one of the class of beneficiaries named; that it is the intent of the law to place the fund beyond the reach of creditors.³ But this would seem to be a very narrow construction to give to the language, and the courts of the state in which the law was passed have held that any one may become a beneficiary of a society organized under it who is capable of taking the fund under the laws relating to an insurable interest in the life of the member.⁴

§ 179. **Wife, widow.**—In the absence of qualifying circumstances; the beneficiary intended by a contract which provides for the payment of the benefit fund to the wife or widow of a deceased member, is the lawful wife of the member in case she

¹ Judges McCrary and Love.

266; Supreme Council v. Priest, 46

² Worley, Adm'r, v. N. W. Masonic Aid Ass'n, 10 Fed. Rep. 227; see Jewell v. Grand Lodge, 41 Minn. 504; 43 N. W. Rep. 88, and Relief Association v. McAnley, 2 Mackey (D. C.) 70.

Mich. 429; Worley v. Association, 10 Fed. Rep. 227.

⁴See §§ 166, 235; Bloomington Mutual v. Blue, 120 Ill. 121; 11 N. East. Rep. 331; Martin v. Stubbings,

³Northwestern Masonic v. Jones, 154 Pa. St. 99; 26 Atl. Rep. 253, citing Mullins v. Thompson, 51 Texas 7; Brown v. Association, 33 Hun

126 Ill. 387; 18 N. East. Rep. 657; Lamont v. Association, 30 Fed. Rep. 817; Lamont v. Grand Lodge, 31 Fed. Rep. 177.

survives him. One Bolton, in 1847, deserted his wife, and in 1862, so far as the forms of law were concerned, married another woman, with whom he lived and cohabited, until he died in June, 1879. In October, 1877, he became a member of a mutual benefit society, and in August, 1878, became a member of another such society, in each of which he continued in good standing until his decease. By the terms of his membership in these societies the benefit fund was "payable to the widow of the deceased member." After the death of the member, the woman with whom he went through the forms of marriage in 1862 collected the benefit fund in each society, and the wife whom he had deserted afterward brought an action to recover from her the sums received by her as benefits from the societies. The supreme court of Maine held that, the contract being in writing and unambiguous and being in terms payable to the widow, the legal widow was entitled to the benefit funds, and that no evidence *dehors* the written contract was admissible to vary its construction and show that the woman with whom the deceased member went through the form of marriage, and cohabited, was intended.¹ The authorities cited by the court relate to testamentary devises, and in explanation of that fact the court said: "But even if this rule of construction governing wills be different from that of other instruments in respect to the question under examination, it is a sufficient answer that a contract of life insurance like those in question, while it is not a testament, is in the nature of a testament; and in construing it the courts should treat it, so far as possible, as a will."²

A member died in good standing in a mutual benefit society, the by-laws of which provided for the payment of a certain sum to the widow of a deceased member. After his death two persons claimed the fund as his widow. The facts shown by the evidence were these: The member, Jacob Elsner, was lawfully married to Yettel, one of the claimants, about 1855, in

¹ Bolton v. Bolton, 73 Me. 299; 5 Ves. 534, 2 Jarm. Wills, Ch. 31; 1 citing Dorin v. Dorin, Eng. & Ir. Ap. Greenl. Ev. section 278.

Cas. 568; Hill v. Crook, L. R. 6 H. L. ² See Masonic Ins. Co. v. Miller, 13 Cas. 268; Gardner v. Heyer, 2 Paige Bush (Ky.) 489; Washington Endow. Ch. 10, 13; Cromer v. Pinkney, 3 Ass'n v. Wood, 4 Mackey (D. C.) 19; Paige Ch. 461, 475; Collins v. Hoxie, McDermott v. Life Association, 24 9 Paige Ch. 81, 88; Hare v. Lloyd, 1 Mo. App. 73.

T. & R. 693; Cartwright v. Vaudry,

Prussia. They lived together as husband and wife for several years, and had two children, a boy and a girl, the issue of this marriage. They were alive at the death of their father. About 1860, Jacob came to this country, leaving his family in Europe. About 1867 he began to cohabit with the other claimant, Johanna, and lived with her, representing her as his wife, until his decease. All the parties were of the Jewish faith. Johanna knew that Jacob had a wife living in Europe, but was told that he had given her a divorce according to the rites of the Jewish church. Jacob had several children by Johanna. There was no pretense, on the one hand, that a legal severance of the bonds of matrimony between Jacob and Yettel ever took place. There was no claim, on the other hand, that Johanna did not consider herself the lawful wife of Jacob, and it was conceded that, but for the impediment of the former marriage, the living together of Jacob and Johanna was of such a character as to create the relation of husband and wife. Many circumstances indicated, and the probability was great, that, when Jacob became a member of the order, he thereby intended to effect an insurance for the benefit of Johanna. "Conceding all this," said the court, "we can not see how the case of Johanna is helped. The contract is clear and unambiguous, and its terms are clearly stated. It expresses conclusively, not the intention of Jacob, but the intention of both the contracting parties. It designates the beneficiary. That beneficiary is the widow, who had lived with Jacob Elsner as a wife in lawful union. Under the evidence in the case, there is only one person who answers that description, and we can not say that the court committed error in awarding the funds strictly in conformity with the express terms of the admitted contract."¹ The evidence in another case² showed that in 1869, a man married a woman in London, and that she survived him when he died in 1883. This man, in 1882, represented himself as a single man, and became a member of a mutual benefit society. Afterward, in 1882, a marriage ceremony took place between him and another woman, the plaintiff in the action, and they thereafter lived

¹Grand Lodge v. Elsner, 26 Mo. N. Y. Weekly Dig. 348; 21 J. & S. App. 108. (N. Y. Sup'r Ct.) 181.

²Schnook v. Sons of Benjamin, 24

together as man and wife. The member notified his lodge that he had married, and that his wife's name was Rebecca. The secretary of the lodge, in conformity with the requirements of the by-laws of the order, reported the facts so communicated to the United States Grand Lodge of the order. After this notification the member continued to pay dues which he was required to pay quarterly, and died in good standing in December, 1883. The contract was payable to his widow or heirs. It was held by the court that this evidence was not sufficient to establish that plaintiff had been accepted by the society as the beneficiary of the contract made with the member, and that such acceptance had become part of the contract to the exclusion of the lawful wife, whom he had married in 1869, and to whom, by the provisions of the by-laws, the benefit fund was payable; and it was consequently further held that a direction of a verdict in favor of the plaintiff was erroneous.¹

§ 180. Where the contract is payable in general terms to the wife or widow of a member, it seems to be legally possible for him to designate as his beneficiary a woman with whom he is living, although he may not be legally married to her, and if such designation is assented to by the society, and becomes part of the contract, she may after his death recover the fund. But in order that the woman thus designated may recover, she must assume the burden of proof and clearly establish, not only that such a designation was made, but also that it became a part of the contract that she should take the fund. Courts will not assist in encouraging concubinage, or permit the rights of a lawful wife to be taken away, except upon clear proof that the rights of some other woman have become fixed in the contract. The constitution of a society stated its object to be to "provide for the relief of widows, orphans and heirs of deceased members." The by-laws provided that the benefit fund should be paid over to the widow of the deceased member, in case he left a widow. The society issued to a member a certificate stating that, in accordance with the requirement of the "by-laws and articles of corporation," his wife, Mary Story, was designated as his beneficiary. She knew of the

¹ See *Keener v. Grand Lodge*, 38 of Birmingham, 18 W. N. Cas. 280. Mo. App. 543; see *Supplee v. Knights*

insurance, and paid all assessments but two out of her own earnings. After his death, in an action by Mary Story to recover the sum due on the certificate, the defense was that the plaintiff was not the lawful wife of the member, as he had a wife living at the time of his pretended marriage to plaintiff. It was held that the facts so set up did not constitute a defense to the cause of action. The court said: "We think (the certificate) operated as an assent by the association to the appointment of the plaintiff as beneficiary of the fund which should become payable on the death of (the member), and entitled her, upon his death, in the absence of any other or different appointment, to demand and receive it. It may be true that the by-law which prescribes the obligation and duty of the association, on the death of a member, contemplated a payment to the person who should be the lawful widow of a deceased member. But this was not a limitation of the power of the company so as to prevent it from recognizing as the beneficiary, a person who might be designated by the member as holding to him the relation of wife. Such designation made during the lifetime of the member and assented to by the company, until changed by the mutual agreement of the member and the company, or at least until the arrangement was repudiated by one of the parties thereto, was binding. The non-disclosure by (the deceased member) of the prior marriage was not a fraud upon the association. Its obligation was not in any way enlarged by making the plaintiff the beneficiary. Nor did the appropriation of the fund for her benefit contravene the policy or objects of the association. The plaintiff had for sixteen years lived with him, believing herself to be his lawful wife. They had children dependent upon them for support. It was a case where it was his duty to provide for them, and the provision he made through this insurance was in entire accord with the object of the defendant's organization."¹ But the doctrine of this case should not be extended beyond the substantial facts of it.² A man obtained a contract of insurance on his life, payable "to his wife, M., or to his heirs at law." At the time he was

¹ Story v. Association, 95 N. Y. 474; ² Schnook v. Sons of Benjamin, see Vivar v. Supreme Lodge, 52 N. J. *supra*. L. 445; 20 Atl. Rep. 36.

cohabiting with M., and had married her, but the marriage was void because he had a former wife living and undivorced. On a bill of interpleader it was held that M., and not the legal wife, was entitled to the fund.¹

§ 181. In a certain case² the testimony showed that the deceased member and the complainant had, for ten years prior to the death of the member, lived together as husband and wife, though no marriage ceremony had ever been performed; that they lived together as husband and wife continuously during those years in the same house, recognizing each other as such, and being so recognized by their friends and neighbors, he providing for her as husband, and she taking care of the household duties. While in that relation, he took out an insurance in her name as Mrs. Nellie Brooks. The court held that the mere name in which he took out the contract of insurance did not change the mutual relations of the parties, that they were, under the laws of Missouri, husband and wife, and that she had an insurable interest, and could maintain the action.

§ 182. On July 5, 1870, a society issued to H. M. Case a certificate of membership. At the foot thereof, and underneath the signature, appeared the following: "All payments or benefits that may accrue or become due to the heirs of the person insured, by virtue of this policy will be payable to Mrs. H. M. Case or lawful heirs." At the time this certificate was issued to H. M. Case, he had a wife living by the name of Amelia M. Case, and a daughter by the name of Inez H. Case. His wife, Amelia M., died September 12, 1878, and subsequently, and on the 3d day of February, 1882, he was again married. Subsequently, and on May 29, 1885, he died, leaving Emma (his second wife) his widow, and Inez H., his only child and heir-at-law, surviving him. The daughter sued the society for the benefit fund. The society paid into court the sum of \$2,922.55 as the amount of benefits due under the certificate, and the widow, Emma, was made defendant.

The court said: "The question presented is whether the plaintiff or the defendant is entitled to the money so paid into

¹ Overbeck v. Overbeck, 155 Pa. St. 5; 25 Atl. Rep. 646.

² Watson v. Association, 21 Fed. Rep. 698.

court. There was no new designation of a beneficiary after the certificate was issued, or after the death of the first wife. That which we have quoted at the foot of the certificate was the designation made at that time. It was "Mrs. H. M. Case, or lawful heirs," meaning Mrs. H. M. Case, or in case she was unable to take by reason of death or other disability, his lawful heirs should become the beneficiary. It is now contended that Mrs. H. M. Case was the name of the defendant, his widow, and that, consequently, she is the beneficiary named in the certificate. We can not assume that he then contemplated the death of his wife, and his subsequent marriage to the defendant in this action. If Amelia M. Case was the person intended by the designation upon the certificate, then, on her death, the designation lapsed as to her, and his lawful heir, which was Inez H. Case, became the person designated as the beneficiary, and inasmuch as there has been no subsequent designation of any other person, it follows that she is entitled to the money. It is urged that, because the words "Mrs. H. M. Case" were used, it was intended that the certificate should mean one person at one time, and another at another time; that it meant Amelia M. at the time it was issued, but that it meant the defendant at time of his death. Such, however, does not appear to us to have been the meaning of the instrument."¹ But the contract may be so worded as to entitle the widow by the second marriage to receive the fund. Thus, in one case² the by-laws provided that, on the death of a member, "the person designated before death, or his widow, child, or children, mother, * * as the case may be, and in the order named," should receive the insurance. By the terms of the certificate the fund was to be paid to "Sarah Given, my wife." Sarah Given died, leaving her husband surviving her, and he afterward married again. He made no change as to his beneficiary, but died, leaving his widow by his second marriage, two children by his first and one by his second wife. It was held, that the appointment of his first wife as his beneficiary was revoked by her death, and that the widow by the second marriage was entitled to the insurance under the by-

¹ Day, *Guardian, v. Case*, 43 Hun 71 Wis. 547; 37 N. W. Rep. 817; see (N. Y.) 179. § 177.

² *Given v. Wisconsin Odd Fellows*,

laws. In another case,¹ the certificate was payable to the member's wife, Elizabeth Riley, or to such other person as might be entitled to receive the insurance. She died, leaving her husband, and several children surviving her. The member afterward married again, and died without making any change in his certificate. In a suit upon the contract of insurance, this widow by the second marriage, and his children by his first wife claimed the benefit fund. The by-laws of the society declared that its object was to afford financial aid to the widows, orphans and heirs of deceased members, or to such person as might be designated by the member, and that, on the death of a member, his widow or designated heirs should receive the insurance. It was held that under the by-laws the widow, and not his children by his first wife, was entitled to the fund.

§ 183. Where a certificate is made payable to the widow of a deceased member, she does not forfeit her right to the benefit fund, by living in adultery. The analogy of a statute respecting the forfeiture of dower for the misconduct of the wife is not applicable to a case of this nature. She is entitled to the fund by contract, not by reason of the relation of husband and wife.² A woman who is married to a man, but illegally, because he had a former wife living at the time, has an insurable interest in his life.³ But if there is a breach of warranty, by reason of the falsity of the statement in the application, that the assured and the beneficiary are husband and wife, there can be no recovery on the policy.⁴ An applicant for insurance was required to state in his application the name of the person to whom he desired the fund to be paid, and the relationship of that person to him. He responded: "To my wife, Emily Louisa Vivar." By its certificate the society promised to pay the fund "to Emily Louisa Vivar, his wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will

¹ *Riley v. Riley et al.*, 75 Wis. 464; 44 N. W. Rep. 112.

² *Shamrock Benevolent Society v. Drum*, 1 Mo. App. 220.

³ *Equitable Society v. Peterson*, 41 Ga. 338; *Durian v. Central Verein*, 7 Daly 168.

⁴ *Holabird v. Ins. Co.*, 2 Dill. 166; 2 Ins. Law Jour. 588; *Supreme Council v. Green*, 71 Md. 263; 17 Atl. Rep. 1048.

or otherwise." It was held that under the language of the contract, the statement was a representation and not a warranty; that the relationship of the payee was not material, and was not deemed material by the society, and that she could recover the benefit fund, though the applicant knew that she was not his lawful wife.¹

The statements in the application were warranted to be true, and the application contained the following: "Write policy payable in the case of death * * * to Mrs. Fred. Martin, whose relation to me is that of wife." Martin, the insured, was a single man. The court said: "We think this statement is neither a warranty nor a material representation. It was merely an indication of the person to whom the policy was to be payable in case of death. Even if marriage had not taken place, it may have been in contemplation, and the insertion of "wife" as beneficiary would thus have been reasonable, and also a matter of convenience, in case marriage should take place before expiration of policy. In any case it could add nothing to the gravity of the risk; neither could it lessen it. The representation was not material."²

§ 184. **Fund payable to wife "for the benefit of herself and the children of said member."**—A certificate of membership in a mutual benefit society, the purpose of which is to pay death benefits to the widows and orphans of deceased members and to other persons shown to be dependent on members, was made payable to the member's widow "for the benefit of herself and the children of said member." When the certificate was issued, the member had two children by a

¹ *Vivar v. Supreme Lodge*, 52 N. J. Association, 21 Fed. Rep. 698; *Fitz-L.* 445; 20 Atl. Rep. 36; citing *Ins. patrick v. Ins. Co.*, 56 Conn. 116; *Co. v. Day*, 39 N. J. L. 89; *Fitch v. Supreme Council v. Bennett*, 47 N. Ins. Co., 59 N. Y. 557; *Anders v. J. Eq. 39*; 19 Atl. Rep. 785; *Supreme Lodge*, 51 N. J. L. 175; 17 Council v. Green, 71 Md. 263; 17 Atl. Rep. 119; 2 Pars. Cont. 769; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Valton v. Association*, 20 N. Y. 32; 675; *Keener v. Grand Lodge*, 38 Mo. Ins. Co. v. Martin, 40 N. J. L. 568; App. 543; *Supreme Lodge v. Hutchinson*, 6 Ind. App. 399; 33 N. East. 168. As to the effect of a false statement of relationship, see *Vivar v. Supreme Lodge*, *supra*; *Durian v. Central Verein*, 7 Daly Rep. 816; *Standard Life v. Martin*, 133 Ind. 376; 33 N. East. 105.

² *Standard Life v. Martin*, 133 Ind. Central Verein, *supra*; *Watson v.* 376; 33 N. East. Rep. 105.

former wife; and at his death he left them, and a child by his second wife who also survived him. At his death his eldest child had been married and had lived at her own home for four years. Upon these facts, the court said: "In the first place it is plain that the widow is not entitled to hold this money absolutely. Even under similar language in a will, the children would have a right which they could enforce in a court of equity.¹ There is nothing to show that it was intended that the sums to be devoted to the benefit of the children should be in the first instance determined by her in her discretion, subject to accountability. There are no words saying that it shall be at her disposal for their benefit, or that she is to maintain or support them. In the purposes of the (society), children are placed on an equality with widows. There is nothing showing any intention to have a permanent or continued trust. The words of the certificate are simple. She is to take the money 'for the benefit of herself and the children.' In many of the cases under wills, there was something to show some discretion reposed in the primary donee, or some duty to support, or some power of disposal; but here there is nothing of the kind. Several of the cases under wills tend strongly to show that under language like this the widow and the children would be entitled to share equally.² In the present case, in view of the circumstances, and of the bold language used in the certificate, we can not go behind the plain words, and are of opinion that (the widow) and three children are each entitled to one-fourth part of the money. The circumstance that (one of the daughters) was married, and had left her father's house, does not cut her off. It would not necessarily do so under a devise. Under this certificate, her rights do not at all depend upon the question whether she was forisfamiliated or not."³ The by-laws of a society provide that "the sum due upon the policy of a deceased member of the company, shall be paid to the widow * * for the use of herself and the dependent children of the de-

¹ Proctor v. Proctor, 141 Mass. 165; v. Loring, *supra*; Jubber v. Jubber, 6 N. East. Rep. 849; Loring v. Loring, 100 Mass. 340; Raikes v. Ward, 543.

² 1 Hare 445; *In re Harris*, 7 Exch. 344.

³ Jackman v. Nelson, 147 Mass. 300; 17 N. East. Rep. 529.

² Proctor v. Proctor, *supra*; Loring

ceased." They declare the intention to be, to keep from want the families of its members, and to keep them from becoming a burden to the society; and they provide that, "in no case shall a member dispose of his policy by will or otherwise, so as to deprive his widow or his dependent children of its benefits." A member by his will gave \$1,000 of his policy to his wife, and the remainder, about \$3,000, to his infant son, for his education, etc. After the death of the member the widow declined to take under the will, and claimed, as the proper construction of the by-laws that the sum due must be equally divided between herself and the child, share and share alike, and that the testator had no power to dispose of it in any other proportions. But the court held otherwise, and said: "Where the member leaves a wife and dependent children, the money must go to their support, according to their necessities, so as to keep them from being a burden to the brotherhood; and as one may be more dependent than another, there must be a reasonable discretion in the member to make such discriminations as will effect the main purpose of the policy; and the division need not be made share and share alike. This construction is strengthened by the fact, that when the member leaves no widow, and his family is broken up, then the money is directed to be divided out among his children or other relations, 'share and share alike,' but there is no such direction, if there is a widow. We do not see any unreasonable exercise of this discretion on the part of the testator." (It was admitted that the widow had a separate estate of \$2,000 worth of land.) "The widow was otherwise provided for to an amount which, if added to the \$1,000 given in the will, would make her more than equal with the child; and the child has to be educated. The widow having already received the \$1,000 left in the will, she is not entitled to any more."¹

§ 185. **Wife and children.**²—A policy was taken out by B. "for the use of his wife, Sarah, and children," and the policy provided that in case *Sarah*, the wife, should die before her husband, the amount of the insurance should be payable to "their children." The wife died leaving her husband and a child surviving. B., the assured, married again, and of this sub-

¹ *Roberts v. Roberts*, Ex'r, 64 N. C. 695. ² See § 209.

sequent marriage one child was born; it was held that the child of the assured by his wife, Sarah, was entitled to the whole insurance.¹ A member of a society took out a policy of insurance providing that the proceeds should "be paid to his wife, Maglien Koehler, and children." The member had children by a former wife, and one child by his wife, Maglien, and she had one child by a former husband. The question arose as to which of all these children were entitled to participate in the benefits of the policy. The supreme court of Iowa said: "If we were to construe these words as meaning Maglien Koehler and *her* children, it would include not only her child by her second marriage, but it would also include her child by her first marriage. Such a construction can not, we think, be the true one. It is not to be supposed that the deceased intended at that time to make (her child by her first marriage) the object of his bounty to the exclusion of his own children. The word "their" can not be held to be the proper one to designate the children, because it is an improper form of expression. In order to sustain the interpretation of the circuit court, it is necessary to make the instrument read as follows: 'to his wife, Maglien Koehler, and her children by him.' We do not think this is the plain and natural construction of the language. We think it should be to his wife and his children. This, it appears to us, is not only the plain and obvious construction, but it accords with the grammatical sense of the words. If the words were 'his wife and children' there would be no doubt that the meaning would be his wife and his children. The name of the wife, Maglien Koehler, is thrown in as descriptive of the person and not as designating whose children are intended."²

An insured was twice married and by both wives had children. After his second marriage he insured his life "for the benefit of his wife and their children." He died leaving surviving him his second wife, five children by her, and one child by his first wife. The court below held that this child by the first wife was entitled to share the proceeds of the insurance

¹ Lockwood v. Bishop, 51 How. Pr. etc., 66 Iowa 325; see also to the same point 221; see Grand Lodge v. Dater, 44 point McDermott v. Life Association, Mo. App. 445. 24 Mo. App. 73.

² Koehler v. Centennial Mutual,

equally with the other children, and on appeal it was said: "Interpreting the policy in the light of the surrounding circumstances, as such instruments, like other written instruments, are always to be interpreted, we think the court below correctly so held. At the time the policy was issued, she was a member of her father's household, and lived with him until his death. She was an afflicted helpless child, and wholly dependent upon him. Upon the second marriage the wife assumed toward her the relation of a mother, and for aught the record shows to the contrary, faithfully discharged the duties incident to that position during the remainder of her father's life. For years before his death * she was an object of great anxiety and solicitude to him. To the motherly care of his wife, as we have seen, he commended her in his will, confident that the trust would not be abused. It is incredible, in view of the facts in the case, that when insuring his life to make provision for his wife and their children, he intentionally excluded from its benefit the one who, of all of them, was most likely to need it."¹ In another case² during the life of his first wife, an insured took out two policies of insurance, payable to his wife, naming her, and providing that, in the event that she died before he did, the money should be paid to their children. She died leaving several children, and the insured married a second time. He afterward died, and a child was born to his second wife soon after his death. It was contended that "their children" meant not only the children common both to the insured and to his wife, but also the children of either of them, and that therefore the child of the second

¹ *Stigler v. Stigler*, 77 Va. 163; *between the children by the first wife* Fauntleroy, J., dissenting. During and the child of the second wife by his second marriage, a policy was her former husband. It will be issued to an insured "for his wife noticed that there was no person who and their children." He died leaving strictly answered to the language of surviving him his second wife of the policy, *their* children, but it was and his children by his first wife substantially interpreted to mean the children of either of them. *Greenfield v. Ins. Co.*, *Bliss on Life Ins.* (2d ed.) § 345; not reported in *New York Supreme Court Reports*.
² *Evans v. Opperman*, 76 Texas 293; 13 S. W. Rep. 312.
 He left no children by his second wife, but she had a child by a former husband, and there was also an illegitimate child of the insured. The supreme court of New York gave the widow one-half of the fund and the other half was divided equally be-

marriage was entitled to share in the proceeds of the policies. But the court said: "We do not assent to the proposition. It may be that, by an inaccurate use of the words, they may be sometimes employed in the sense contended for by appellee, and that under peculiar circumstances, as in the case of *Stigler v. Stigler*,¹ to which counsel refer, they were properly construed to have that meaning. We think, however, the obvious and more accurate meaning of the terms is the children of both the persons referred to. They could not have been intended to include any other children of the wife, because she could only have married again after the death of the husband, and after the policy had become her absolute property. If the husband had intended to embrace any child or children he may have had by a second wife, his meaning would have been clearly and accurately conveyed by providing that if his wife died first the policy should be payable to his children. By the use of the term 'their children,' we think, was meant the children common to both husband and wife, and that * (the child by the second marriage) was entitled to take nothing."

A certificate of membership in a mutual benefit society provided, if certain conditions were observed and performed, for the payment of the sum of \$5,000 on the death of the member, "to be paid as a benefit to his wife, L. H., and children equally." The member, at his death, left his wife and five children, one of whom died after suit had been brought on the certificate in the name of all, leaving his mother and four brothers and sisters as his only heirs. The cause proceeded to judgment in the names of the widow and remaining children, who recovered judgment for the full \$5,000. The supreme court of Illinois held that the widow and remaining four children were entitled to the same sum as though she and all the children were suing, and that the judgment was not for too much. The court said: "It is insisted it was error of law to render judgment in favor of the widow and the four surviving children, for the reason the benefit secured was to be paid to the widow and the children equally, of whom the proof shows there were five when the suit was brought. The objection seems to be, it was not proper to render judgment for full value of the benefit on a declaration in favor of the widow and four children, with the name of the deceased child omitted.

¹ 77 Va. 163.

It is not perceived there was any error in so rendering the judgment. There are two views, both of which sustain the action of the trial court: First, the benefit was, by the certificate, secured to be paid to the widow (by name) and children—that is to Laura Hoffman, and to a class of persons designated as children, and to be ascertained after the death of the holder of the certificate. At the trial it was found, from the proof, there were but four children surviving. They then constituted all the class embraced in the term ‘children’ and it was entirely correct to render judgment in their favor, as was done. Second, were this not so, the judgment might be sustained for another reason. It provided by the certificate, that, in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or devisees of the holder of the certificate. A correct reading of this provision would be, in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here the plaintiffs were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular and authorized by law.”¹

A certificate was made payable to the wife and children of the member, and provided: “In case of the death of the said beneficiary before the death of the person whose life is assured, the amount of the assurance shall be paid at maturity to the heirs or assigns of the said person whose life is assured. The four children of the member died in infancy, and he died leaving his wife and certain brothers and sisters. It was held that the widow was entitled to the full amount of the fund.”²

§ 186. “**Child.**”—In the construction of the designation of beneficiaries, the word “child” is not confined to persons under the age of majority, and where a certificate of insurance is payable to the children of a deceased member, his sons and daughters take the fund in equal proportions, without regard to their ages or their dependence upon the deceased for support. This rule may, of course, be modified by the provisions of the contract of insurance. It is a part of the general plan of mutual benefit insurance to enable the insured

¹ *Covenant Mutual Benefit Association v. Hoffman*, 110 Ill. 603.

² *Schneider v. Ins. Co.*, 33 Mo. App. 64.

to assist his family, whether or not its members are of lawful age or dependent upon him, but, when consistent with its organic law, it is proper for a society to limit its benefits to minor children, and to those who are dependent upon the members for support. Where there is no such limitation in the laws of the society, and in the absence of an expression by the member in his certificate of a purpose to limit the benefit to a particular class of his children, it must be held, on the plainest principles, that the member intended to extend it to all his children in existence at the time of his death. It would be so held in the interpretation of a will; and a certificate of insurance, being a post-mortem provision for the persons endeared to the member, is to be interpreted upon similar principles.¹ Whatever may be the rule in ordinary life insurance, where the rights of the beneficiary named become vested on the execution of the contract,² it would seem that, under the general plan of mutual benefit insurance, where the children of the member are designated as his beneficiaries, the children to whom the covenant extends are only the child or children living at the death of the member.³ Where a certificate is made payable to the children of a member as a class, those of the class will take who are in being at the time when it becomes payable.⁴ A contract of insurance is not void for uncertainty because the beneficiaries are designated as "the children of" the member or some other person.⁵ Where a certificate was made payable to the wife if she survived her husband, otherwise "to their children for their use, or to their guardian if under age;" where the wife did not survive her husband, and he died leaving only a child by adoption, of full age, and the circumstances showed that the husband and wife intended that he should be included in the benefits, the adopted child was held to be entitled to all the proceeds of the contract.⁶

¹ *McDermott v. Life Association*, 24 Mo. App. 73; *Felix v. Grand Lodge*, 31 Kan. 81; see § 204.

² See *Connecticut Mutual v. Baldwin*, 15 R. I. 106; *Continental Life v. Webb*, 54 Ala. 688; *Continental Life v. Palmer*, 42 Conn. 60; *Hull v. Hull*, 62 How. Pr. (N. Y.) 100; see § 188, 201.

³ §§ 187, 201.

⁴ *United States Trust Co. v. Mutual Benefit Life Ins. Co.*, 115 N. Y. 152; 21 N. East. Rep. 1025; *Lane v. De Mets*, 13 N. Y. Supp. 347; *Walsh v. Ins. Co.*, 133 N. Y. 408; 31 N. East. Rep. 228; *Appeal of Brown*, 125 Pa. St. 303; 17 Atl. Rep. 419.

⁵ *Brooklyn Life v. Bledsoe*, 52 Ala. 538.

⁶ *Martin v. Ins. Co.*, 73 Me. 25.

§ 187. **Children born after the issuing of the certificate of membership.**—In ordinary life insurance, where the procuring of a policy in favor of a certain person is in the nature of an irrevocable and executed voluntary settlement on him, subject to the performance of certain conditions, and where the interest vests in the beneficiary at the moment of the issue of the policy, a contract payable to the wife and children of the insured does not extend to a child born after its execution, but only to those in being at that time.¹ The general object of a mutual benefit society, as expressed in its charter or by-laws, may make applicable to the contract of mutual benefit insurance, the doctrine in respect to testamentary bequests to children, payable *in futuro*, viz.: That the bequests are payable to them as a class, and that the class will open to let in after-born children to participate. A widower having four children applied to a mutual benefit society for membership, and in his application directed that in case of his death all benefits should be paid to his four children, whose names were therein given. He afterward married and died, leaving another child by his last wife. The certificate issued to him was made payable at his death "to his children." The object of the society was to establish a benevolent relief fund to protect families of deceased members, and to assist them in distress, and, by the terms of its constitution, the benefit fund, on the death of a member, was payable "to his family or his heirs." The supreme court of Texas held: (1) The right to take under the certificate must be determined by its language and not from the terms used in the application for membership. (2) The certificate, which on its face inured to the benefit of his *heirs*, extended the scope of the benefit, and by accepting it the member must be held to have approved its terms.² (3) The object of the society being benevolent, its consent that the benefit should exclude an infant born after membership, can not result from construction, but must appear in some clear and explicit way. (4) The child born after the issuance of the benefit certificate was entitled to share in the benefit, equally with each of the four children named in the application. In construing the contract of insurance, the

¹ Connecticut Mutual v. Baldwin, 15

² See § 146.

R. I. 106; 33 Atl. Rep. 105.

court said: "The case presented would be that of an application for a certificate for the benefit of certain named parties, and the issuance of a certificate for the benefit, not only of these, but of other beneficiaries also. What would be the effect of such a transaction? The applicant would not be bound to accept it, but if he did, the beneficiaries would be those designated in the certificate, and not those named in the application. It would be a case where a proposition for a contract was made by one party to another, which was accepted in a materially modified form. The party proposing would not be bound to accede to the altered contract, but if he did, it would be binding upon him according to its modified terms. Thomas did accept a certificate different from that for which he applied, and it would seem that the effect of the contract was to entitle all of his children to participate in the relief fund upon his death, and not those only who were alive at the time the certificate was issued.

"But the appellee contends that we must construe the application as explanatory of the certificate, and must modify the legal sense of the word 'children,' so as to make the application and the certificate harmonize with each other; that Thomas having applied for a certificate for the benefit of all his children then in existence, and the society having issued him a certificate for the benefit of 'his children,' we must conclude that the certificate was intended to accord with the application, and this would exclude any child born to the applicant in the future. There would be some force in this suggestion, if we are to look to the application and the certificate as alone constituting the contract between the parties. But in all cases of contracts formed by reason of obtaining membership in a mutual aid society, its constitution and by-laws enter into the contract, and it must be read in the light afforded by these in order to arrive at a true construction of its terms. Article 2, section 3, of the constitution of the society states that one of its objects is 'to establish a benevolent and relief fund for the protection of the families of deceased members, and so assist them in distress and in sickness.' Article 3, section 2, makes the benefit money payable on the death of a member to 'his family or his heirs.' By-law number seven is to the same effect. These and other provisions

of these instruments show conclusively that one of the main objects of the society is to confer its benefits upon the entire family of a member, and not to restrict them to a portion, to the exclusion of the remainder. * * It may be that a member, with the express consent of the society, could direct his benefit money to be paid to a portion of his family, to the exclusion of the remainder, but the consent of the society would have to appear in some clear and unmistakable way. It would not appear from doubtful words, much less from those whose legal construction would evidence a dissent from the member's request, and issuance of a certificate more in accord with the spirit and intention of the constitution and by-laws of the society. * * We think the certificate on its face includes after-born children, and that it is more in consonance with the spirit and intention of the constitution of the society to so construe it, than to exclude from its benefits the after-born children of the applicant."¹

But where the beneficiaries named in the certificate are the member's three children, all he then has, an after-born child can not claim a share of the fund, on the ground that the object of the society, as expressed by its laws, is to afford aid to the "widows, orphans and heirs, or devisees" of a deceased member, for the member has a right to designate the beneficiaries within any one or more of these classes.²

§ 188. **Child, grandchild.**—It may be laid down as a general rule that the word "child" does not embrace a grandchild.³ But to this rule there are two classes of cases which form exceptions: First, where the will or writing would otherwise be inoperative, or the manifest intention would be defeated; second, when the will or writing shows, by other words, that the word was not used in its ordinary and proper

¹ Thomas v. Leake, 67 Texas 469; *atta*, 21 N. J. Eq. 84; Mowatt v. S. W. Rep. 703; see Ricker v. Carow, 7 Paige 328; Cutter v. Charter Oak, etc., 27 Minn. 193. Doughty, 23 Wend. 522; Thompson

² Spry v. Williams, 82 Iowa 61; 47 v. Ludington, 104 Mass. 193; 1 Roper N. W. Rep. 890. on Leg. 69; 4 Kent 345; Continental

³ Churchill v. Churchill, 2 Met. 469; Ins. Co. v. Webb, 54 Ala. 688; Hughes v. Hughes, 12 B. Mon. 121; sell v. Russell, 64 Ala. 500; United Hallowell v. Phipps, 2 Wharton (Pa.) States Trust Co. v. Ins. Co., 115 N. Y. 376; Jackson v. Staats, 11 Johnson 152; 21 N. East. Rep. 1025; Lane v. (N. Y.) 337; Feit's Executor v. Van- De Mets, 13 N. Y. Supp. 347.

sense, but in a more extended sense. In *Duvall v. Goodson*,¹ the charter of the Kentucky Masonic Ins. Co., providing that, if the member "should leave no widow or child then (the fund) to be appropriated according to his will, or if he makes no will and leaves no widow or child, it shall vest and remain in the company," was the subject of construction, and the court held that where a member died leaving no widow or children, but leaving a grandchild, the word "child," in the charter embraced grandchild, as to hold otherwise would defeat the manifest intention of the members of the company.² In *Continental Life v. Palmer*,³ the policy was payable to the wife, if she survived her husband; if not, to their children. The husband survived the wife, and one of the children died during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled, if he had survived the insured.⁴

¹ 79 Ky. 224.

² See *Robinson v. Duvall*, 79 Ky. 83; see §§ 186, 201, 204.

³ 42 Conn. 60; 5 L. & A. Cases 37.

⁴ In this case the court said: This instrument, being testamentary in its nature, should be interpreted by the same rules. Therefore, as in wills of doubtful meaning, one construction being in harmony with the statute and the other contrary to it, preference is given to the former, so this contract shall receive an interpretation, if possible, which will dispose of the fund according to the law of descent. We think there is no difficulty in so interpreting it. There is a natural presumption that the parties so intended it. When we consider that it was a *mother* who made this contract, and who probably paid the premiums, we can not possibly presume that she, had her attention been called to it, and had she known that the child of one of her children would become an orphan before the policy became payable, would intentionally deprive such child of all interest in the policy. Had such been

her intention it would have been easy to express it in unmistakable terms. Had the policy been payable to her "surviving children," or to those "who should be living" at the death of the insured, it would have removed all doubt. But supposing, as she doubtless did, that all her children would survive, the policy was made payable to them generally. And now a contingency has arisen which manifestly was not contemplated. If the natural presumption can not be regarded as a legal presumption, and the law, to meet the contingency, is compelled to interpolate in the contract a provision, either limiting the payment to the surviving children, or including as payee the issue of a deceased child, we think both reason and justice require the latter. It requires no argument to show that it is just. Its reasonableness is equally apparent when we consider the nature and object of the estate, and the relation to it of the parties concerned. There is another view which may be taken of this case, and which will lead us to the

Where a life insurance policy was issued on the life of the husband for the use of his wife, and, if she died before him, the amount of insurance was payable "to her children for their use, or to their guardian if under age," and the wife died before her husband, it was held that a grandchild of the insured, the issue of one of the children who had died before his mother, was entitled to a share under the policy.¹ The court said: "By the policy in question an irrevocable trust was created in behalf of Mrs. Hull and her children. The same principles should be applied in its construction which govern testamentary disposition of property. The intention is clear that in the event of Mrs. Hull's death before the falling in of the policy, it was to enure to the benefit of her children generally. There is no limitation to class or condition, nor to living or surviving children. Evidently this phraseology was intended to include the children of a deceased child."² The by-laws of a mutual benefit society provided that on the death of a member a sum of money should be paid "to the widow of such member, if there be one; if he leaves no widow, then to the child or children or to their lawful guardian for them, share and share alike. Should the deceased member leave no widow, child or children, the money shall be paid to such person as he may have designated in writing." In construing the meaning of the words "child or children," the supreme court of Rhode Island held that they must be taken in their

same result. The moment this policy was executed and delivered, it became property, and the title to it vested in some one. * * The payees consist of two parties, the wife and the children. * * Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. The title vested in point of right immediately, but was liable to be divested upon the happening of a subsequent event. That such a right is recognized as property, and is transmissible to heirs, is a proposition abundantly established by the authorities; citing *Winslow v. Goodwin*,

Met. 363; *Fearne on Remainders*,

364; *Redfield on Wills*, 390; *Keller v. Gaylor*, 40 Conn. 343; *Conn. Mutual v. Burroughs*, 34 Conn. 305, and the other cases; *Park, C. J.*, dissented.

¹ *Hull v. Hull*, 62 How. Pr. 100. It will be observed that this decision is placed upon grounds which do not exist under the general plan of mutual benefit insurance, namely: An irrevocable trust, and the vested interest of the beneficiaries at the moment of the issuing of the policy.

² But see *Palmer v. Horn*, 84 N. Y. 576; *Magaw v. Field*, 48 N. Y. 668; *Sherman v. Sherman*, 3 Barb. (N. Y.) 387; in which cases it was held that the children under the provisions of certain wills took as classes.

primary meaning, and could not be extended to include grandchildren.¹

§ 189. **Heirs, legal heirs, heirs at law.**—The word “heirs” is frequently used in the statutes providing for the organization of mutual benefit societies and in the certificates of insurance issued by such societies to indicate a class of persons who may, or the persons who shall receive the benefit fund on the death of the member. It often becomes necessary, therefore, to determine who are the heirs of the deceased member. At common law one’s heirs are the persons who would inherit his real estate by right of blood. The statutes of adoption and those of descent have, in every state, to a greater or less degree, enlarged the meaning of the word, so that it may include persons not of the blood of the intestate. At common law the word had no reference to the distribution of any personalty, and this rule has not been disturbed by statute in some states. In those states, therefore, where this common law rule obtains, the word “heirs” in a statute setting forth a class of persons who may take the fund, or in a certificate designating the persons who shall take the fund on the member’s death, might, possibly, be taken to mean the person or persons to whom the real estate of the member would pass, under the statutes of descent, whether such persons be akin to him, or not. But in this connection, reference may be made to the well settled principle that the word “heirs” is flexible, and that in the construction of wills, in the case of personalty, it is taken to mean next of kin.² In most states, however, the statutes provide not only who shall inherit the realty of an intestate, but also who shall be the heirs of

¹ Winsor v. Odd Fellows, etc., 13 241; Irwin’s Appeal, 106 Pa. St. 176, R. I. 149; see also, Lane v. De Mets, 182; Eisman v. Poindexter, 52 Ind. 13 N. Y. Supp. 347, distinguishing 401; Welsh v. Crater, 32 N. J. Eq. Continental Life v. Palmer, *supra*. 177; Hascall v. Cox, 49 Mich. 435;

² Vaux v. Henderson, 2 Jac. & but see Tillman v. Davis, 95 N. Y. Walker’s Chancery Rept. 388; Ward 17, where the authorities defining v. Saunders, 3 Sneed (Tenn.) 387; “heirs” and “next of kin” are col- Hodge’s Appeal, 8 Weekly Notes of lated, and the English doctrine, and Cases, 209; Gittings v. McDermott, 2 that of some states, holding that M. & K. 69; Mace v. Cushman, 45 those words include a widow, is dis- Me. 250; Houghton v. Kendall, 7 Al- approved. Bishop v. Grand Lodge, len 72; Sweet v. Dutton, 109 Mass. 112 N. Y. 627; 20 N. East. Rep. 562; 589; Furguson v. Stuart’s Ex’rs, 14 Walsh v. Walsh, 20 N. Y. Supp. 933; Ohio 140; Elby’s Appeal, 84 Pa. St. see §§ 176, 197.

his personal property. When the same persons are the heirs of both the real and the personal property, the question as to who are the heirs, and, hence, the beneficiaries in a contract of mutual benefit insurance, is in no way complicated by the statutory provisions, but where, under the same facts, the personal property descends to other persons than those who inherit the real estate—where the heirs of the personal property are not the same persons who are the heirs of the real estate, the first question to be determined is, who are to be taken as the beneficiaries, the heirs of the personalty, or the heirs of the realty?

In the case of *Alexander v. Association*,¹ a member died holding certificates of membership in a society for \$8,500, payable to his heirs at law. He left no child or descendant of a child; but left a widow, father and mother, one sister and three brothers. The charter of the society recited that it was formed “to secure pecuniary aid to the widows, orphans, heirs or devisees of deceased members.” Section 1 of chapter 39 of Statutes of Illinois provides as follows: “Second. Where there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then (the estates, both real and personal, of intestates shall descend) to the parents, brothers and sisters of the deceased and their descendants,” etc. “Third. When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children, or descendants of a child or children.” The question for decision was, who are the heirs of the decedent, and the beneficiaries of the certificates? Under the third clause just quoted, the widow takes as the heir of her deceased husband.² It was held in the courts below that the “widow is the sole heir at law to the personal property of the deceased, and the other heirs at law, the father, mother, brothers, etc., have no right, title or interest in said fund, or any part thereof,” and the supreme

¹ 126 Ill. 558; 18 N. East. Rep. 556.

² *Sutherland v. Sutherland*, 69 Ill. 481; *Rawson v. Rawson*, 52 Ill. 62.

court of Illinois affirmed the judgment.¹ It is manifest that, in such a case as the one under consideration, it is necessary to hold either that the heirs of the real estate are the beneficiaries, that the heirs of the personal estate are the beneficiaries, or that the heirs of the real and personal estate are entitled to the fund. Of course the fund was no part of the estate of the intestate, but if it had been, it would have been a part of his personal estate. The fund is personal property. As was said by the court in the opinion: "In placing a construction on the contract of the parties it must be remembered that in the use of the words named in the policies it will be presumed the parties had in view the disposition of personal assets, and not real property, as they were dealing only with the disposition of personal assets."

Where a member has made his heirs the beneficiaries of his insurance, it is natural to conclude that the heirs of his personal estate are entitled to the fund.² By the statutes of descent of Tennessee, the real estate of an intestate owner is inherited "by all the sons and daughters of the deceased, to be divided amongst them equally." By the statutes of distribution, the personal property of an intestate owner is to be distributed "to the widow and children or descendants of children representing them, equally, the widow taking a child's share." A member of a society died leaving surviving him a widow, three children and two grandchildren, the children of a son who died before him. He also left a certificate of insurance payable to his "legal heirs." In certain litigation which arose concerning the benefit fund, it became necessary for the supreme court of Tennessee to decide who were the beneficiaries

¹ See also *Lawwill v. Lawwill*, 29 Ill. App. 643.

² See *Richards v. Miller*, 62 Ill. 420; *Rawson v. Rawson*, 52 Ill. 62; *Weisert v. Muehl*, 81 Ky. 336; *Houghton v. Kendall*, 7 Allen 72; *Sweet v. Dutton*, 109 Mass. 589; *Mace v. Cushman*, 45 Me. 250; *N. W. Masonic v. Jones*, 154 Pa. St. 99; 26 Atl. Rep. 253; *Bishop v. Grand Lodge*, 112 N. Y. 627; 20 N. East. Rep. 562; *Britton v. Supreme Council*, 46 N. J. Eq. 102; 18 Atl. Rep. 675; *Codman v. Krell*, 152 Mass. 214; 25 N. East. Rep. 90. Where a cer-

tificate was payable to the heirs of a member, and he died leaving a widow, but no children, the word "heirs" was construed to mean those designated by the statutes of distribution to take the surplus personal property of the decedent. *Johnson v. Supreme Lodge*, 53 Ark. 255; 13 S. W. Rep. 794; *Young Men's Association v. Pollard*, 3 Ohio Circuit Ct. Repts. 577; *Leavitt v. Dunn* (N. J. Err. and App.), 28 Atl. Rep. 590; *Lyons v. Yerek* (Mich.), 58 N. W. Rep. 1112.

named in the certificate, and that court held that the widow, children and grandchildren, the distributees of the personal estate of the intestate under the statutes of distribution, were the beneficiaries and were entitled to the fund.¹ Where the heirs at law of the member are his beneficiaries, the word "heirs" means the distributees under the intestate law of the domicile of the member.² Where the statutes of a state provide different courses of descent for ancestral and non-ancestral property, every reason and analogy point to the proposition that a benefit fund derived by contract from a mutual benefit society shall go to those persons who are the heirs of the non-ancestral property of the decedent.³

§ 190. The word "heirs" has a technical signification, and where there is nothing in the context to show that it was used in any other sense, it will be presumed that in the certificate the term "legal heirs," "heirs at law," or "my heirs," was used in its strict and primary sense. In certain contingencies, brothers, sisters, parents, and even remote kindred are heirs at law, but it would be absurd in the extreme to suppose that a member of a mutual benefit society, who has designated his "legal heirs" as his beneficiaries, intended that all his kindred should take. The legal presumption in such a case would clearly be that he intended those to whom the law would give his property if he died intestate; and, hence, it is the actual capacity of inheritance at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him, under a state of facts which did not exist, which determines who is an heir of a decedent.⁴ It is to be presumed that the member knows who are meant by the words "heirs," "heirs at law," and "legal heirs," and when he accepts a contract containing any of those terms, in the absence of anything in the contract manifesting a different intention, courts will presume that he adopted the legal meaning which those words have when used in statutes, deeds and other instruments of writing by persons skilled in the use of legal terms. When any of these words

¹ Gosling, *Guardian, v. Caldwell*, 69 Tenn. (1 Lea) 454.

² *Jamieson v. Association*, 12 Cin. Law Bull. 272.

³ *N. W. Masonic v. Jones*, 154 Pa. St. 99; 26 Atl. Rep. 253; 32 W. N. Cases, 169.

⁴ *Phillips v. Carpenter*, 79 Iowa St. 99; 600; *Silvers v. Association*, 94 Mich. 39; 53 N. W. Rep. 925; *Gauch v. St.*

are used in any legal instrument, there is a presumption, more or less strong according to the circumstances, that they are employed in a technical sense. But where the context determines the sense in which they are used in a contract, effect must accordingly be given to them. When, under the law of a state, the widow is an heir of her deceased husband, and, under the facts of a case, is his sole heir at law, it is immaterial as showing the intention of the deceased member that he made his certificate payable to his "heirs," and not to his "heir" at law. By the use of the word "heirs" the member meant what he said—that whoever might prove to be his heirs, and *nemo est haeres viventis*, should have the benefit fund. His heirs might be one or more persons. His widow might, and might not be one of them.¹

The fact that she is the beneficiary directly named in other policies of insurance on her husband's life does not change the rule of construction.² A provision in a certificate for the payment of the fund to his heirs at law is a very natural one for a member to make. If he have a wife, but no child, he may well intend by the certificate of insurance, and by the use of the words "heirs at law," "heirs" or "legal heirs," to provide for children who may be afterward born to him, or, in the event that no living child or descendant of a child shall survive him, his widow shall take the fund as sole surviving heir. A divorced wife is entitled to no share of a benefit fund payable to the member's heirs.³ Where the certificate was payable to "his legal heirs," and the member left a wife and child, it was held that the fund went to the child, since that section of the law of descent which provided that "if the intestate leave no issue, the one-half of his estate shall go to his parents, and the other half to his wife" was the only instance where the rights given to the widow under the statutes of Iowa partook of the nature of heirship. The court said: "No one having children speaks of his wife, in contemplation of her survivorship, as his heir; but it is believed it is universal that

Louis Mutual Life, 88 Ill. 251; Elsey v. 262; Loos v. Ins. Co., 41 Mo. 538; Odd Fellows Ass'n, 142 Mass. 224; 7 Lawwill v. Lawwill, 29 Ill. App. 648. N. East. Rep. 844; 2 N. Eng. Rep. 667.

¹ Jameson v. Knight Templar Association, 12 Cir. Law Bull. 272; 324; 12 S. W. Rep. 626; Tyler v. Alexander v. Association, *supra*; see association, 145 Mass. 134; 13 N. East. Mace v. Cushman, 45 Me. at page Rep. 360; see § 164.

she is referred to as widow, and the children as heirs. While technically, and in the single instance stated, a widow may become a legal heir of her deceased husband, our conclusion is, under the facts of the case, that whether used in their technical or general sense, the words 'legal heirs' were not intended, and should not be construed, to include (the widow)."¹ The words "my legal heirs," "my heirs at law," "my heirs," as used in wills, have frequently been the subject of judicial construction. The meaning of these words when taken alone is usually plain enough, but the contention always is that, from the context, it is evident that they were used in some other than the ordinary sense. In a will, the testator usually makes provision for several persons, and, in several clauses of the instrument, gives and bequeaths his property. In such cases, the context often controls the meaning of words used. But in mutual benefit insurance, such words and phrases are used only in answer to such questions as, "To whom shall the benefit fund be paid?" "Whom do you designate as your beneficiaries?" etc. The answer is usually short, and to the point; "my heirs," "my legal heirs," etc. The other provisions of the contract relate to matters entirely apart from the disposition of the fund. When we come, therefore, to place a construction upon this designation of the beneficiary, we are seldom met with other provisions of the certificate upon the same subject, from which the theory may be drawn that the member intended to use the words in a different sense than the ordinary one. Generally there is no ambiguity in the contract, and recourse must be had to the statutes alone to find out who are the legal heirs of the intestate. The interpretation given by the courts to such terms and words, when used in wills and controlled by other words, will, now and then, be of the first importance in determining the proper construction to be given to the designation of beneficiaries made by a member of a mutual benefit society. But so many of these decisions have direct application to the statutes of the states in which they are rendered, that no attempt will be made to review them here. It is evident that the laws of the different states must determine the question as to who are the heirs of an

¹ Phillips v. Carpenter, 79 Iowa 600; 44 N. W. Rep. 898; see Gauch v. Ins. Co., 88 Ill. 251.

intestate, and that the persons who will take the fund under a designation of "my heirs," in one state may have no interest in the fund under the laws of some other state. Thus, in Indiana a certificate payable to the "legal heirs" of a member, when he leaves a widow and children at his death, is payable to all of them. His widow, in such case, is included in the word "heirs."¹ In Illinois, in such case, she is not included among the beneficiaries.²

§ 191. The designation of the beneficiary as set forth in the certificate must be construed with reference to the law under which the society is organized, the charter, the constitution and the by-laws. The provisions of these form the context which may control the meaning of the designation. From this fact, it is evident that it is often necessary to do more than to resort to the statutes of the state to determine who, under their provisions, are the legal heirs. It is not always by any means a plain question of statutory provision, but, on the contrary, it is often a matter involving a nicety of distinction and a careful consideration of the whole contract of insurance, in connection with the statutes to declare who are the beneficiaries of the contract under the designation of "my heirs." By the charter of a mutual benefit society, the persons whom the insured could designate as beneficiaries were limited to his widow, his orphan children and other persons dependent upon him, and the by-laws of the society provided that if the assured made no designation the amount should be

¹Wilburn v. Wilburn, 83 Ind. 55; Johnson v. Alexander, 125 Ind. 575; 25 N. East. Rep. 706; see Young Men's Association v. Pollard, 3 Oh. Cir. Ct. Repts. 577; Kaiser v. Kaiser, 13 Daly 522; Day v. Case, 43 Hun 179.

²Gauch v. Ins. Co., 88 Ill. 251; but in The Covenant Mutual Benefit Association v. Hoffman et al., 110 Ill. 603, it was provided by the certificate that, in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or devisees of the holder of the certificate. The court said: "A correct reading of this provision would be, in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here the plaintiffs (the widow and four children) were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular, and authorized by law." See note to § 204; Phillips v. Carpenter, 79 Iowa 600; Johnson v. Knights, 53 Ark. 255; Walsh v. Walsh, 20 N. Y. Supp. 933; Bishop v. Grand Lodge, 112 N. Y. 627; 20 N. East. Rep. 562.

paid to his widow, or, if he left no widow, to the guardian or trustee of his minor children. The insured at the time of making his designation had a wife and two daughters, and in his application for membership in answer to the question "To whom will you have your death loss paid?" answered, "To my heirs," and, in reply to a request to state the relationship of any of the persons to whom payable, answered, "Wife or daughters." The wife survived the insured. Upon these facts the supreme court of Massachusetts held that "the meaning is sufficiently plain that he intended that the payment should be to his widow, or, if he left no widow, to his surviving daughters. * * The intention that the money should be divided between the widow and surviving children is not in accordance with the purpose of the association. * * If there was any designation, it was to the widow, or, if there should be no widow, to the surviving daughters. If there was no valid designation, the widow is entitled to the money. It is, therefore, unnecessary to consider the several objections presented to the sufficiency or validity of the designation. In any aspect of the case, the money is to be paid to the widow."¹ In *Kentucky Masonic v. Miller's Administrator*,² the charter of the society provided that the benefit fund should be paid to the widow and children of the deceased member, according as the will of said deceased member should direct, or, if he should leave no widow or child, then to be appropriated according to his will. A member took out a certificate payable to his "heirs, or as he may direct in his will." He died intestate leaving a widow and no children, and his widow and not his administrator was held to be entitled to the funds. The court said: "The charter prescribes who may become members of the company, and their obligations, and who shall be beneficiaries of the membership after the death of the member, and it is not in the power of the company, or of the member, or of both, to alter the rights of those who, by the charter, are declared to be beneficiaries, except in the mode and to the extent therein indicated."

¹ *Addison v. New England Commercial Traveler's Ass'n*, 144 Mass. 591; 12 N. E. East. Rep. 407.

² 13 Bush (Ky.) 489.

§ 192. The words "heirs" and "next of kin" may be so used, in association with other language, and under such circumstances, as to show an intention to include others than blood relations. A member of a mutual benefit society had no near relative by blood except a brother, of whom his wife knew nothing, and who was living in Europe. The member was on the most cordial terms with his wife, whom he had married more than twelve years before, and by whom he had one child and afterward had another. He was a foreigner, and presumably not well acquainted with the English language. He was illiterate, for in his application for insurance he designated as his beneficiaries "*my leagal heiros.*" He afterward made a will, giving all his personal estate to his "beloved wife," but left little provision for her when he died, except such as the certificate might afford her. He left no children, father, mother, brother or sister surviving him, except the brother who claimed the fund under the term "*my leagal heiros.*" The court said: "All this is entirely inconsistent with the theory that he used the phrase 'legal heirs' in its ordinary acceptance; but he intended thereby to designate his wife and children, if he should leave any; and this is the meaning often attached to the phrase by the unlearned, especially when only personal property is concerned."¹

§ 193. **Orphan, orphans.**—The word "orphan" is frequently used in the laws providing for the organization of mutual benefit societies, and in the contracts of insurance issued by them. It is not so used in a technical sense, as meaning a minor or an infant who has lost both of his parents. It may be stated that from the various provisions of the charter, by-laws and certificates, it will appear that the word "orphans," as used by societies means children of a deceased member, whether their mother is living or not, and whether they are over or under the age of majority. The charter of a society declares one of its objects to be to assist "the widows and orphans of deceased members," and to establish a "widows' and orphans' benefit fund." The constitution provides that from this fund a sum of money shall be paid to a member's family, or to those dependent on him, as he may direct. A certificate

¹Kaiser v. Kaiser, 24 N. Y. Weekly Dig. 410; 13 Daly 522.

was issued to a member, payable to his wife "for the benefit of herself and the children of said member." It was held that under these provisions the benefit fund was payable equally to his widow, his child by her, and his two children by a previous wife, one of whom was twenty-three years of age—all the children being orphans within the meaning of the charter.¹ But, of course, the word may be so used as to exclude the idea that an adult child is intended to be embraced within its meaning. Thus, in *Hammerstein v. Parsons*,² the by-laws of the society provided for the payment of the benefit fund to the widow of a deceased member; "should there be no widow, then the said amount shall be paid to the lodge of which the deceased was a member for the use or benefit of his orphan child or children in equal shares. In case there should be no widow, child or children, or designated person or object, the amount shall be paid to his executor or administrator." The deceased member left no widow, and the fund was claimed by his children who were all adults at the time of his death. The court said: "We are clear that the plaintiffs are not orphan children within the meaning of that section. The entire context of the section shows that the words, 'orphan children,' relate to a class of persons who are not *sui juris*, otherwise the interposition of the lodge as a trustee, in case the beneficiaries are orphans, would be wholly meaningless. * * The rules expressly provide that in a certain contingency the benefit shall be paid to the executor or administrator of the deceased. This is the contract between the parties, and the question for the determination of the court is, not whether a payment to the adult children of the deceased is more in harmony with the object of the association, but whether the contingency upon which the fund thus became payable exists. If it does exist, then the personal representative named, and not the adult children, is the proper party plaintiff. * * The words, 'child or children,' necessarily relate to the child or children mentioned in the preceding clause, namely, 'orphan child or children.' The section will admit of no other intelligent construction. The last clause does not purport to create any right in any class of children,

¹ *Jackman v. Nelson*, 147 Mass. ² 29 Mo. App. 509.
300; 17 N. East. Rep. 529.

but merely undertakes to prevent a lapse of forfeiture in certain cases, and it is evident that it was not designed that the fund should lapse if the deceased left adult children, and yet vest in the personal representative if he left no children at all."

§ 194. **Family.**—The laws of Michigan provide for the organization of mutual benefit societies to secure to "the family or heirs of any member, upon his death," a certain sum of money. An old man became a member of a society organized under this act, and designated as his beneficiary a young woman who was not related to him, but who had lived with him for many years in the same household, and had been treated by him as if she were his daughter. In deciding that such a designation was within the terms of the above law, the supreme court of Michigan said: "Now this word 'family' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relations, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers. We discover nothing in the statute implying a narrow sense, and we should not be inclined to attribute one where the result would cause injustice. It seems to us that the circumstances constitute a case within the meaning of the legislature."¹ In *Supreme Lodge v. Nairn*,² it was held that an army comrade and intimate friend of a member of a society, who had lived at his house for several years, and had become physically disabled and dependent on others for support, did not fall fairly within the designation of the word "family" as used in the statute.³

¹ *Carmichael v. The N. W. Mut. Ben. Ass'n*, 51 Mich. 494; see *Folmer's Appeal*, 87 Pa. St. 133.

² 60 Mich. 44.

³ See *Thompson on Homesteads and Exemptions*, §§ 48, 68, where the following and many other cases are cited, which bear more or less upon the question under consideration. An unmarried man, and his indigent mother and sisters living with

him and supported by him, constitute a family. *Marsh v. Lazenby*, 41 Ga. 153. A widowed daughter and her minor children, being incapable of supporting themselves and living together with her father, constitute a family. *Blackwell v. Broughton*, 56 Ga. 390. And so, in New York, do a widower and a grown-up daughter, living together. *Cox v. Stafford*, 14 How. Pr. 519, and,

A society was organized to assist "the widows, orphans, or other dependents of deceased members," and a by-law provided for the payment of the fund, in certain events, to the family of a deceased member. A member made his mother his beneficiary. She was not living with him, but was living with her husband in another town and county. It was held that she was not one of the members of his family, within the meaning of the by-law, for so broad a construction would make the by-law overreach the scope of purposes of the organization.¹ The constitution of a society provided that "this association shall have for its object the payment to the family of the deceased member" of a certain sum of money, and that said sum "shall be paid to his legal representatives, or to such person or persons as he may have designated or appointed in writing. * * *Provided, always,* that when such member shall leave a widow or children, he shall have no power to deprive her or them of the benefits specified in this article, by will or otherwise, but the same shall be paid to her or them absolutely." A member procured an insurance in favor of his niece with whose family he was living, but at the time of his death he had a married daughter living apart and independent of him. In deciding that the niece, and not the daughter, was entitled to the fund, the court said: "The whole instrument is to have such fair and rational construction as to make all its provisions operative and efficient. As was said in 1 Kent's Commentaries, 463, 'the principle undoubtedly is, that the sound interpretation and meaning of a statute, on a view of the enacting clause and proviso taken and construed together, is to prevail. If the principal object of the act can be accomplished, and stand under the restriction of the proviso, the same is not to be held void for repugnancy.' * *

in Wisconsin, do an unmarried son who supports his dependent mother, and minor and dependent brothers and sisters, all living together. *Connaughton v. Sands*, 32 Wis. 387; see also *Greenwood v. Maddox*, 27 Ark. 658. An unmarried man supporting a widowed sister, with or without dependent children, is the head of a family. *Wade v. Jones*, 20 Mo. 75; see *Bailey v. Cummings*, U. S. Cir. Ct. East. Dist. Mo.; see *Bouvier's Law Dictionary*, title, "Family;" *Strawn v. Strawn*, 53 Ill. 263. ¹ *Elsev v. Odd Fellows Mutual*, 142 Mass. 224; 7 N. East. Rep. 844; see *Marsh v. Supreme Council*, 149 Mass. 512; 21 N. East. Rep. 1070; *Brooklyn Ass'n v. Hanson*, 6 N. Y. Supp. 161; see § 231.

Undoubtedly it has been the controlling idea of this association from the outset to provide for the families of members. This is manifest from the declaration of the object of the organization in (certain articles of the constitution). Benefits were to be paid 'to the family' in the first instance, and 'to the widow, orphans or family' in the second. * * (The niece) was within the circle of the family of (the member), and under his contract with the association and a rational interpretation of the charter, she has a right to the fund in controversy."¹ Two brothers, married and living with their wives and children, are children of the same parents, but not members of the same family in the sense in which the word "family" is used in the charter of a mutual benefit society.² The words "family" or "other dependents" of a deceased member, as used in a law setting forth the classes of persons to whom a fund shall be paid, do not include one knowingly occupying the relation of mistress or concubine, though named in the certificate as bearing the relation of wife, and being dependent on the member for support.³ A divorced wife is not a part of the family of a member.⁴

Where a member of a society designates his "family" as his beneficiary, and his family at the time consists of himself and his wife and daughter, the wife and daughter are the beneficiaries; but where the daughter dies before her father, and the wife is the only member of his family who survives him, she takes the whole fund, and the daughter's children take nothing.⁵

§ 195. **Dependents.**—The statutes of many states and the charters and by-laws of many societies provide for the payment of benefits to those dependent upon the member. The courts have not as yet been called on in many cases to construe the meaning of the term "dependents," as designating a class of beneficiaries. It was said *arguendo* in *Ballou v. Gile*,⁶ "We think the true meaning of the word 'dependent,' in this

¹ *Folmer's Appeal*, 87 Pa. St. 133; ³ *Keener v. Grand Lodge*, 38 Mo. see *Supreme Council v. Green*, 71 App. 543.

Md. 263; 17 Atl. Rep. 1048.

² *Supreme Council v. Smith*, 45 N. 324; 12 S. W. Rep. 626.

J. Eq. 466; 17 Atl. Rep. 770; see ⁵ *Brooklyn Masonic Relief Ass'n v. Britton v. Supreme Council*, 46 N. J. Hanson, 6 N. Y. Supp. 161; Eq. 102; 18 Atl. Rep. 675.

⁶ 50 Wis. 614.

connection, means some person or persons dependent for support in some way upon the deceased." It is evident that the facts in each individual case can alone determine whether or not the beneficiary is such a dependent as is meant by the terms of the contract of insurance. Of course, a liberal construction should be given to the terms of this contract, and a dependence founded upon a moral duty of one to provide for another should be as clearly recognized as that which arises from a legal duty.¹ But whether a person may appoint as the beneficiary of such a contract of insurance a person not related to him in any manner, but one whom he is supporting merely through the promptings of affection and charity, has never been decided. A sister can not, as a matter of law, be said to be dependent upon her brother, nor can a mother be said to be dependent upon her child, and one may or may not be dependent on his brother.²

A woman to whom a member of a mutual benefit society is engaged to be married can not be said, as a matter of law, to be dependent upon such member. She does not come within the class of persons whom, if able, he is bound by law to support. The mere engagement to marry imposes no obligation upon him, except to carry out his contract with her.³ Where the betrothed was, during the entire period of her engagement, working for her own living, earning during part of that time more than her intended husband, and receiving noth-

¹ Carmichael v. N. W. Mut. Ben. Ass'n, 51 Mich. 494. 33 N. East. Rep. 183; reversing 42 Ill. App. 455; Supreme Council v. Perry,

² Supreme Council v. Perry, 140 Mass. 580; 5 N. East. Rep. 634; Elsey v. Odd Fellows' Mutual, 142 Mass. 224; 7 N. East. Rep. 844; Supreme Council v. Smith, 45 N. J. Eq. 466. A single woman, dependent on her brother for her support and education, has a sufficient interest in his life to entitle her to insure it. Lord v. Dall, 12 Mass. 115. The mere relationship of brother is not such as will support a policy of life insurance. Lewis v. Ins. Co., 39 Conn. 104; Bevin v. Ins. Co., 23 Conn. 244. 140 Mass. 580; 5 N. E. Rep. 634; Palmer v. Welsh, 132 Ill. 141; 23 N. East. Rep. 412; 33 Ill. App. 188. In

Chrisholm v. National Ins. Co., 52 Mo. 213. S. C., 14 Am. Rep. 414, a contract of marriage existed between plaintiff and one Clark, and the company made and delivered to plaintiff its policy of insurance whereby it insured the life of Clark for five thousand dollars. The policy was issued and delivered to plaintiff and made payable to her as the intended wife of Clark, and she paid the annual premium. After she had paid another premium, but before

³ Alexander v. Parker, 144 Ill. 355;

ing from him except occasional presents of clothing and money, she is not dependent on him.¹

But if as a matter of fact, the *fiancee* of a member is supported partly by her own labor and partly by money given to her by him, she is such a dependent as will entitle her to the fund.²

The law of Missouri provides for societies for the relief and aid of the families, widows, orphans, or other dependents of the deceased members. The words "other dependents" are inserted to include persons who, not being either members of the family of the deceased, nor his widow or orphans, are yet dependent upon him in some manner. Any other construction would require the court in each case to enter into an investigation of the fact how far the widow or orphans, or any other member of the family, was self-supporting; which, in itself, instead of furthering the objects of these associations, would soon encompass their complete destruction.³ This is in accord with the construction placed upon the statute by the supreme court of Michigan, in *Supreme Lodge v. Nairn*,⁴ where it is said: "The laws of that state (Missouri) expressly forbid corporations of this sort from paying benefits to any but the member's family or dependents. * * The intent of the prohibition is clearly to shut out all persons who are not actual relatives, *or* standing in place of relatives in some permanent

the contemplated marriage, Clark died. The court, upon these facts, said: "The insurance was not a mere wagering contract and, therefore, can not be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark; a valid contract of marriage was subsisting between them. Had he lived and violated the contract she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defense in this case is devoid of merit, and is not creditable to the defend-

ant making it. There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts. *Trenton Mutual v. Johnson*, 4 Zab. 576.

¹ *Alexander v. Parker*, *supra*.

² *McCarthy v. Order of Protection*, 153 Mass. 314; 26 N. East. Rep. 866.

³ *Grand Lodge v. Elsner*, 26 Mo. App. 108.

⁴ 60 Mich. 44.

way, *or* in some actual dependence on the member." A person whose only relation to the deceased member was that of a creditor, is not a person dependent upon him, within the meaning of a statute providing for the organization of societies "for the purpose of assisting the widow, orphans, or other dependents of deceased members."¹

A law of the corporation required applicants to enter upon their applications "the name or names of the members of their family, or those dependent upon them," to whom they desired the benefit paid. It also provided that members in good standing might surrender their certificates, and have new ones issued, payable "to such beneficiary or beneficiaries, dependent upon them, as they may direct." It was held that the right of substitution of beneficiary is not restricted by the latter clause to persons actually dependent upon the member for support, but that any member of the family may be substituted.² A woman knowingly occupying the relation of mistress or concubine, and being dependent on the member for support is not a "dependent" contemplated by a law setting forth the classes of persons to whom the benefit fund of the society may be paid.³ But where the constitution and by-laws of a society establish three classes of beneficiaries,—the family of the member, relations by blood, and those dependent on him for support—a named beneficiary, designated as the member's wife, who is dependent on him for support, and who is innocent of any wrong, is entitled to payment on the member's death, though she was not in fact his lawful wife, because he had been guilty of bigamy in marrying her.⁴

§ 196. **Relations, relatives.**—The words "relation" and "relative" are very broad and comprehensive terms, and may include any and every relation which arises in social life. Literally, it takes in every kind of connection, and would have so wide a range as to be open to objection as indefinite and vague. To avoid this consequence, recourse is had to the statutes of distribution; and it has been long settled that a bequest

¹ Skillings v. Mass. Ben. Ass'n, 146 Mass. 217; 5 N. Eng. Rep. 718; 15 N. App. 543.

East. Rep. 566.

³ Keener v. Grand Lodge, 38 Mo. Supreme Lodge v. Hutchinson, 6

² Marsh v. Supreme Council, 149 Ind. App. 399; 33 N. East. Rep. 816. Mass. 512; 21 N. East. Rep. 1070.

to relations, applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either by next of kin or by representation of next of kin.¹ The terms are defined by lexicographers as signifying "persons connected by consanguinity or affinity," and relationship is described as "kindred, affinity or other alliance." The most common use of the terms is to express some kind of kindred either of blood or affinity, though properly by blood.² The supreme court of Pennsylvania has decided that, in a will, the terms "my nearest relations or connections" do not include the testator's wife.³ Where only persons related to or dependent on the member could take the fund under the contract, and he designated by name as his beneficiary the wife of his grand-nephew, who was not dependent on him, it was held that she was properly included in the phrase "related to the member," though she was not related to him by blood.⁴ A son is a relative by affinity of his step-father, after his own mother's death, within the meaning of the charter of a society providing for the payment of benefits to relatives of the members.⁵ A sister is a "relative" who may be a beneficiary.⁶

§ 197. **Legal representatives.**—The strict and technical meaning of the words "legal representatives" and "personal representatives" is executors or administrators, and, in a contract of insurance, where these words are used to designate its beneficiaries, they must be given that meaning, unless there is something in the context or surrounding circumstances to in-

¹Smith v. Campbell, 19 Ves. 400; this association will be best attained
2 Jarman on Wills, 4th Am. Ed. 45. by the adoption of a common, though

²Davies v. Baily, 1 Ves. Sr. 84; it may be an inexact interpretation
Garrick v. Lord Camden, 14 Ves. of the words "related to" as used in
372; Paine v. Prentiss, 5 Met. 396; the article above referred to, rather
Dickinson v. Purvis, 8 S. & R. 71; than by a restricted meaning that
Kimball v. Story, 108 Mass. 382; Drew may not have been known, and is
v. Wakefield, 54 Me. 291; Supreme certain to defeat the purpose of this
Council v. Bennett, 47 N. J. Eq. 39; deceased member; and that no rule
19 Atl. Rep. 785. of legal construction will be violated

³Storer v. Wheatley, 1 Pa. St. 506; by giving it such meaning."
see Esty v. Clark, 101 Mass. 36; 2
Williams on Executors, 1004; 2 Jar-
man on Wills, 49. ⁵Simcoke v. Grand Lodge, 84 Iowa
383; 51 N. W. Rep. 8; see Spear v.
Robinson, 29 Me. 531.

⁴Bennett v. Van Riper, 47 N. J.
Eq. 563; 22 Atl. Rep. 1055. The court
said: "It seems that the objects of
⁶Anthony v. Association, 158 Mass.
322; 33 N. East. Rep. 577.

icate that they were used in a different sense.¹ A certificate of membership payable to the legal representatives of the insured member, is *prima facie* the same as if made payable to himself. But where the charter of a society provides that certain persons only may be beneficiaries, as for instance, the widows, orphans and heirs of deceased members, the term "legal representatives" as designating beneficiaries will be construed with reference to the charter, as meaning those who are the legal representatives of the member in contemplation of the charter.²

A certificate made payable to the wife and children of the member or their representatives was held to be for the benefit of the only child of the last survivor of the children of the insured, the wife having died and the other children having died without issue. The court said: "Here (the certificate) is payable to the children or 'their representatives.' This expression shows that the possibility of the death of some or all of the children during the life of the insured was not overlooked, and that such an event was intended to be provided for. And when we consider the nature and design of life insurance, and the relation of the parties, we think the policy should be construed as if it were payable to such of the children as should survive the insured, and the surviving issue of such as might die during his life."³ Where, by an article of the by-laws of a society it is provided that the benefit fund may be disposed of in a certain manner by the member, but, if not so disposed of, it shall go to the heirs and legal representatives of such member, by the words "heirs and legal representatives," as applied to personal property, is evidently meant next of kin, as ascertained by the intestate laws.⁴

The charter of a society stated: "The general nature of its

¹ They have frequently been given 286; *Greenwood v. Holbrook*, 111 N. a different meaning. 2 *Redf. Wills*, Y. 465.

401; *Warnecke v. Lembea*, 71 Ill. 91; ² *Relief Association v. McAuley*, 2 *Farnam v. Farnam*, 53 Conn. 262; 2 *Mackey* (D. C.) 70; see § 176.

Atl. Rep. 325; 5 *Atl. Rep.* 682; *Davies* ³ *Robinson v. Duvall*, 79 Ky. 83; *v. Davies*, 55 Conn. 319; 11 *Atl.* see *Benefit Association v. Hoffman*, *Rep.* 500; *Cox v. Curwen*, 118 Mass. 110 Ill. 603; see §§ 186, 188.

196; *Halsey v. Patterson*, 37 N. J. ⁴ *Bishop v. Grand Lodge*, 112 N. Y. *Eq.* 445; *Coster v. Butler*, 63 How. 627; 20 N. East. *Rep.* 562; 2 *Hodges' Pr.* 311; *Lee v. Dill*, 39 Barb. 516, *Appeal*, 8 *Weekly Notes of Cases* 521; *Drake v. Pell*, 3 *Edw. Ch.* 266, (*Pennsylvania*) 209; *Elsev v. Odd Fel-*

business, and its general purpose, is the insuring the lives of the members upon the plan of paying to the representatives of every deceased member a certain sum, to be assessed upon and received from the other members of said association." There was nothing in the entire contract of insurance, limiting the beneficiaries to any particular classes of persons, and the word "representatives" was construed as meaning and including any person whom the member might designate, or, if he should fail to designate any one, the person to whom the by-laws should direct the fund to be paid.¹

Where a certificate provides for the payment of the benefit fund to the "heirs or representatives" of the member, the money will be paid to the heirs or next of kin, if it appear from the context that the object of the member was to make provision for his family, and not that the money should go to his executors or administrators to be administered as ordinary assets of his estate. The intention must control in the construction of the meaning of such words, and that intention is to be gathered by a view of the context and circumstances, and the purposes to be attained. The general object of the society, as declared in its charter or constitution, may throw light upon their proper meaning. It was held, in one case, that since "where it is meant that the money resulting from the policy shall descend and be used as common assets, the invariable language is 'to pay to the assured, his executors, administrators or assigns,' the changing of the language and using terms of different expression clearly import that the money was intended for the benefit of his heirs, or next of kin, and that it was not to be administered on as assets by the executor or administrator." The only child and sole heir of the assured was given the money, under a designation of "heirs or representatives," and it was held that the word "representatives" used in the policy in conjunction with the word "heirs" could not divest her title or divert the money to another source.² In *Wason v. Colburn*,³ a different conclusion was announced. An endowment policy was payable "to the

lows' Mutual, 142 Mass. 224; 7 N. East. Rep. 844; see § 189.

¹ *Walter v. Benefit Society*, 42 Minn. 204; 44 N. W. Rep. 57.

² *Loos v. Ins. Co.*, 41 Mo. 538.

³ 99 Mass. 342.

said assured, or in case of prior decease, to his heirs or representatives." The court held that the policy was primarily intended to be for the benefit of the assured himself, being an endowment policy for the period of ten years. In case of his decease within that period, it was made, by its terms, payable "to his heirs or representatives." Upon his death, intestate, within the ten years, his administrator, who was his personal representative, became entitled, by well settled principles of law, to collect the amount due, and hold it as part of the estate of the intestate. The court referred to *Loos v. Ins. Co.*, *supra*, and afterward said: "The term 'representatives' legally indicates administrators, and we can not construe it as excluding them."

Words are not always used in the same sense, and, in cases of doubtful phraseology in written instruments, it is the province of courts to ascertain the sense in which they were used. For this purpose they may not only examine the context, as in the cases just reviewed, but they may also consider the circumstances and conditions surrounding either of the parties to the contract at the time it was executed. Thus, where the aged and heavily indebted father of a family dependent on him for support, had taken a certificate of insurance, payable to his "legal representatives," the court held that the fund was payable to his widow and children, stating that it would be presumed under the circumstances that he intended by that term to describe them, rather than his executors or administrators.¹

Where a member procures a contract of insurance to be made payable "to his heirs, executors, administrators or assigns," and there is nothing in the contract showing a contrary intent, the fund is payable upon his death to his administrator or executor for the payment of his debts and for distribution under the law.²

§ 198. **The assured.**—The promise of a company was to pay a certain sum to the “assured, his executors, administrators or assigns * * for the express benefit of C. M. R.—, wife of the said assured, and their children.” In discussing the

¹ *Griswold v. Sawyer*, 125 N. Y. 411; 26 N. East. Rep. 464; *Andrews and Gray, JJ.*, dissenting; reversing 8 N. Y. Supp. 517. ² *Rawson v. Jones*, 52 Ga. 458; *Burroughs v. State Mutual*, 97 Mass. 359; *Brown v. Mansur*, 64 N. H. 39; 5 Atl. Rep. 768; 2 N. Eng. Rep. 857.

meaning of these words, the court said: "It is argued, the word 'assured,' as used in the policy, is to be understood, the parties for whose benefit the policy was taken. Such construction can not be maintained without doing violence to the words employed. The sum insured is for the benefit of C. M. R—, wife of the 'assured' and their children. Plainly, the word 'assured' as there used, and elsewhere in the policy, means the husband, with whom the contract was made, and no reasoning, however subtle, can make it even appear to mean anything else."¹ In another case the court said: "The policy recites that the consideration was paid by the plaintiff, and the promise therein is to pay the assured. The term 'assured' can mean none other than the party paying the consideration and asking for the insurance for *his* benefit."² In *Hogle v. Ins. Co.*,³ the insurance money was payable to "the assured, his executors, administrators or assigns," and the court held that the word "assured" meant, not the person whose life was insured, but the person for whose benefit the insurance was made, and so held, though the policy speaks of the "assured," his executors, etc.⁴

§ 199. "Guardian" of member.—A subdivision of an application was as follows: "Name and relationship of person to whom benefit is to be paid" (after which was written the name of the beneficiary.) Relation (after which was written the word "guardian." In commenting upon this designation, the city court of New York said: "The term 'guardian' after the word 'relation' in the application has no significance in this case. The applicant was twenty-four years of age, and in sound health at the time of making the

¹ *Mass. Mutual v. Robinson*, 98 Ill. 324; "heirs of the insured," see *Whitehead v. Ins. Co.*, 33 Hun 425.

² *Smith v. Ins. Co.*, 5 Lans. 545.

³ 6 Robertson 567; 4 Abb. N. S. 346.

⁴ See *Connecticut Mutual v. Luchs*, 108 U. S. 498; 2 Sup. Ct. Rep. 949; *Brockway v. Ins. Co.*, 29 Fed. Rep. 766. In *Bliss on Life Insurance* at section 5, it is said: "There has recently been some attempt to give more precision to the nomenclature of life insurance, by applying the term, the 'insured' to the person

whose life is insured, and the term the 'assured' to the person or persons for whose benefit the insurance is effected. Where a person insures his own life, without naming any other person to receive the money, he would, if such nomenclature were adopted, be at once the insured and the assured. Such a distinction in the use of language would be a matter of great convenience. * * but it can hardly be said to be fully established."

application. It was known to all that the plaintiff could not have been the guardian of the applicant in the legal, but rather in the popular sense of that term, which means 'one who guards, preserves or secures.' (Webster's Dict.) The plaintiff kept a boarding house, and the applicant boarded with her, and in this limited sense 'she guarded, preserved and secured' him. The term as used in the application means this, or nothing. The loss was payable to the plaintiff, and the action was properly brought in her individual name."¹

¹ Carraher v. Insurance Co., 11 N. Y. St. Reporter 665.

CHAPTER XIII.

CONCERNING BENEFICIARIES IN MUTUAL BENEFIT INSURANCE.

- § 200. Estate of the member as a beneficiary.
- 201. When the member becomes a beneficiary by inheritance.
- 202. Death of beneficiary during life of member.
- 203. Death of one of two named beneficiaries; survivorship.
- 204, 205. Interest of beneficiary vests on death of member.
- 206. Death in common disaster; survivorship; presumption.
- 207. Death of member and beneficiary at same instant.
- 208. Agreement between member and beneficiary as to disposition of fund.
- 209. When beneficiaries take equally.
- 210. In what proportions heirs take the fund.

§ 200. **Estate of the member as a beneficiary.**—When a contract of insurance is made payable to the estate of the member, the fund will, generally speaking, go to his administrator or executor upon his death as general assets of the estate, for the payment of debts and for distribution according to the rules established by the statutes of distribution of the domicile of the intestate, or according to the terms of his will.¹ But in *Clinton v. The Hope Insurance Company*,² the designation of the beneficiary was “the estate of Daniel Ross.” The court, in giving the rule to determine the effect of these terms, said: “If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous so that it can not be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract; and when thus ascertained it will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it, who were in the minds of the parties when the contract was made.”³

¹ *Daniel's Ex'r v. Pratt*, 143 Mass. ² 45 N. Y. 461.

216; 10 N. East. Rep. 166; *Basye v.* ³ *May on Insurance*, §§ 91, 445.
Adams, 81 Ky. 368.

In this case the subject of the insurance was a cotton mill, and parol evidence was admitted to show who was intended by the designation "the estate of Daniel Ross," and that the insurance was taken out for the benefit of his widow and heirs. The admission of this evidence was placed upon the ground that the words used in the policy were intended to designate the persons holding the legal title, and that to speak of the property left by a deceased person, including the real property, especially before final settlement of his affairs, as his estate, if not an accurate, is not an unusual designation. A policy of life insurance was issued "for the benefit of the estate of the insured." Under a statute of Florida,¹ it was held that wherever the contract does not describe a person or persons, class or classes, in such terms as to show affirmatively that the beneficiaries are not the children, husband or wife of the assured, it inures to her or their benefit. Speaking of the term "for the benefit of the estate of the insured," the court said: "This language must be given such meaning as conforms to the intention of the parties, and this intention must be determined by the acts of the parties and surrounding circumstances. * * There is nothing in this bill to show the existence of a creditor of Pace at the date of the contract. It does appear that he had an only child, the plaintiff, then not five years of age. The term estate here in its strict legal signification embraces neither the administrator, the heir nor the creditor of the assured. It means the effects, personal and real, left by the decedent, when given a signification with reference to a period subsequent to his death, and that is the date when the benefit was to accrue. Such literal legal signification would be absurd. The word benefit in a policy of insurance must be interpreted with reference to persons, not things. An insurance may be for the benefit of the person owning the house,

¹ Section 22, page 534, McClellan's Digest: "Whenever any person shall die in this state, leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of his or her child, or children, husband or wife, in equal portions, or to any other person or persons, for whose use and benefit said insurance is de-

clared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment or any legal process by any creditor or creditors of the person whose life was so insured, unless said policy declares that said insurance was effected for the benefit of such creditor or creditors."

not for the house. To benefit stocks and stores was not the intention of the parties. Without entering into any elaborate discussion of the subject we will simply state that the cases having a bearing upon the subject,¹ show that these and similar terms, under the circumstances of this case, are so interpreted as to benefit the surviving members of the family rather than for the benefit of the creditor or administrator, and that in this instance the beneficiary intended was the infant child. In the interpretation of contracts of this character the courts go a great way in this direction. This, we think, would have been the construction of this policy, independent of the policy of the statute, which, as a matter of course, should have some effect in controlling our action in this matter.”²

Where the constitution of an unincorporated voluntary society provides in effect for the creation of a trust fund, from which upon the death of a member a payment of \$10,000 is directed to be made to such person or objects as he may have designated in writing, or if no such written disposition has been made by him, then to certain specified persons, such fund forms no part of the estate of the deceased member, and his personal representatives can not maintain an action to recover it.³ Where a certificate of insurance on the life of a wife is made payable to her children, and she dies before any children are born, her executor may not maintain an action at law for the amount of the insurance. The fact that she had power to change the beneficiary during her life, but did not exercise it, does not make the contract a part of her estate.⁴

The proceeds of a policy of life insurance for the benefit of the wife of assured, and in case of her death before him, “for his own order,” become, on the death of assured after his wife’s death, assets of his estate, to be administered for the benefit of his creditors and distributees.⁵

§ 201. When the member becomes a beneficiary by inher-

¹ *Loos v. Ins. Co.*, 41 Mo. 538; see 798. But the society might be liable § 258; *Clinton v. Ins. Co.*, 45 N. Y. 454; for the assessments paid, with interest, since no liability ever attached on the contract. *Globe Ins. Co. v. Boyle*, 21 Oh. St. 119.

² *Pace v. Pace*, 19 Fla. 438.

³ *Boyden v. Ins. Co.*, 153 Mass. 544;

⁴ *Swift v. San Francisco Board*, 67 27 N. East. Rep. 669; see *Bancroft v. Cal.* 567. *Russell*, 157 Mass. 47; 31 N. East. Rep.

⁵ *McElwee v. Ins. Co.*, 47 Fed. Rep. 710.

itance.—A benefit certificate is often made payable to the wife and children of the member. As any one or all of such designated beneficiaries may die before the member, it becomes important to determine whether the member himself becomes a beneficiary by inheritance from any beneficiary so dying. Generally speaking, it may be said that he does not. Under the general plan of mutual benefit insurance, the beneficiary has no vested right in the benefit fund, and the persons who may be beneficiaries are limited so as to exclude the member and his estate from taking the fund.¹ But these features of this general plan are changed in some societies; and if the beneficiary so dying had a vested right in the fund, and if the estate of the member may under the contract take the fund, then the case does not differ from ordinary life insurance, and, according to the weight of authority, the member becomes a beneficiary under the contract, where he is the heir of the deceased beneficiary. A mutual benefit society issued to A. a certificate of membership which entitled "his wife, her heirs or assigns, upon the death of said A. to \$3,000." The wife died intestate during A.'s lifetime leaving children, and afterward A. died without having in any manner changed the designation of his beneficiary. It was held that as A. survived his wife, he or his estate was entitled to a share as her heir. The supreme court of Pennsylvania says: "The fact that this association has some features to distinguish it from a life insurance company does not establish any error in this judgment. The husband inherited from his wife."² It is held in some courts that a certificate of membership, as between the member and the society, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of contracts. But when considered with respect to the rights of

¹ See § 202.

² Mutual Aid Society v. Miller, 107 Pa. St. 162; see Anderson's Appeal, 85 Pa. St. 202; Deginther's Appeal, 83 Pa. St. 337, where policies were payable to the wife of the insured, "her executors, administrators and assigns," and the husband was held to take as her heir upon her death

prior to his. Hutson v. Merrifield, 51 Ind. 24; Harley v. Heist, 86 Ind. 196; Glanz v. Gloeckler, 10 Ill. App. 484; affirmed 104 Ill. 573; Endie v. Slemmons, 26 N. Y. 9; Knickerbocker Life v. Weitz, 99 Mass. 157; North American Life v. Wilson, 111 Mass. 542; Continental Life v. Palmer, 42 Conn. 60.

those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, it should be regarded in the light of a testamentary provision rather than of a contract, and should be interpreted on similar principles.¹

A man took out a policy of insurance on his life, payable to his wife and children, or their legal representatives. At the date of the policy the insured had three children, all minors and unmarried. In a few days thereafter his wife died. He died on April 7, 1878, having survived all his children. Two of the children died in infancy and unmarried; and one, having married, left an only child and her husband surviving her. Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, intending it as a gift to her. The question to be decided was whether the grandson or the niece of the insured was entitled to the benefit fund. On behalf of the niece it was contended that upon the delivery of the policy the wife and the three children of the insured became invested, each with a one-fourth interest in it; that upon the death of the wife, her interest passed to her husband under the statutes of distribution; that at the death of the unmarried daughters, their interests passed to their father in the same way, and that at the death of the married daughter, during the life of her father, her interest lapsed as if it had been a legacy; and in this way the insured became the owner of the entire policy, and could invest his niece with a good title. But the court said: "In taking the policy, the insured was not providing for himself, but for his wife and children after his death; and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should pass to himself, and at his death to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family—wife and children alike—to suppose that

¹ Robinson v. Duvall, 79 Ky. 83; Conn. 65; Union Mutual v. Montgomery, 70 Mich. 587; 38 N. W. Rep. 588; Dowment Association v. Wood, 4 14 West. Rep. 877; Bolton v. Bolton, Mackey (D. C.) 19; McDermott v. 73 Me. 299; Chartrand v. Brace, 16 Centennial Mutual, 24 Mo. App. 73; Colo. 19; 26 Pac. Rep. 152. Continental Ins. Co. v. Palmer, 42

his intention was, that in case one or more should die, without leaving children, the share to which he was entitled, had they survived, would go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived; and this evident intention ought not to be defeated unless there are insurmountable legal obstacles in the way of effectuating it."¹

§ 202. **Death of the beneficiary during the life of the member—When the heirs of the beneficiary do not take the fund.**—In an ordinary contract of insurance, where the beneficiary has a vested interest in the money to become due under it, and the insured is in some respects a stranger to it, the death of the beneficiary prior to that of the insured will not terminate his interest in the contract, but it will pass, as his other personal property, to his legal representatives.²

But it is a general principle of mutual benefit insurance that the beneficiary named in a certificate acquires no vested rights in the benefit fund until the death of the member. It follows from this that when a designated beneficiary dies prior to the death of the member, the benefit fund does not, on the subsequent death of the member, go to the administrator, nor descend to the heirs of such beneficiary.³ This general principle may, of course, be changed by the statute, charter, by-laws, or certificate, but there are few mutual benefit societies in which any such change has been made. A member of a society appointed his wife as his beneficiary, but the contract of insurance did not designate to whom the fund should be paid, in case the beneficiary died before the member. The appointment did not vest in the beneficiary the absolute right to the fund. It was held, under these facts, that the appointment was revoked by the death of the beneficiary; that *Rev. St. Wis.*

¹ *Robinson v. Duvall*, 79 Ky. 83; 60; *Johnson v. Hall*, 55 Ark. 210; see *Covenant Mutual v. Hoffman*, 110 Ill. 603; *Hull v. Hull*, 62 How. Pr. 100.

² *Hutson v. Merrifield*, 51 Ind. 24; *Y. 580*; *Haskins v. Kendall*, 158 Mass. 224; *Gutterson v. Gutterson*, 50 Minn. 258; *Foster v. Gile*, 50 Wis. 603; *Continental Ins. Co. v. Palmer*, 42 Conn. 258.

³ *Hellenberg v. I. O. O. B.*, 94 N.

§ 2347, which empowers a husband to insure his life in favor of his wife, and provides that such insurance shall inure to her separate use and that of her children, does not apply to mutual benefit insurance.¹ The charter of a society provided for payment of the benefit fund, in case of death, to the legal representatives of a member, and the by-laws provided for payment of the fund, in case of failure to designate a beneficiary, to the legal representatives of the deceased. A member designated his wife as his beneficiary. She died before he did, but he did not make a new designation. The court held that, under the charter and by-laws, if a member failed to appoint a beneficiary, or if, at the date of his death, there is no appointee named by him, alive and capable of taking, it is to go to his legal representatives, and in this case it was held that his representatives, not hers, took the fund.² The object of a society, as declared by the charter, was "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws, if a deceased member had no "legal representatives," the fund should become the property of the association. A member made the following designation of beneficiary in his application: "In the event of his death he directs that all benefits arising from his connection with the association be paid to his wife, A. R., unless he shall otherwise order and give to the secretary of the association ten days notice of his desire." His wife, A. R., dying, the member married S. A. R., and afterward died intestate without children, leaving his second wife surviving him. In construing this designation, which he left unchanged, the court held, that the language used by the member in designating his first wife as the beneficiary, must be interpreted as meaning that the first wife should take the fund in case she survived him, and, as she did not, her representatives were not entitled to it.³ A beneficial association to provide

¹ *Given v. Wisconsin Odd Fellows*, etc., 71 Wis. 547; 37 N. W. Rep. 817; *Lewis*, 9 Mo. App. 412; see also *Mun-Riley v. Riley*, 75 Wis. 464; 44 N. W. Rep. 112; *Lyon v. Rolfe*, 76 Mich. 146; 42 N. W. Rep. 1094; *Rothweiler v. Ryan*, 4 Oh. Cir. Ct. Repts. 338; *contra*, *Clark v. Aid Union*, 6 Pa. Co. Repts. 321.

² *Expressmen's Aid Society v. hall v. Daly*, 37 Ill. App. 628; see *Brew v. Clement*, 48 Kans. 386; 29 Pac. Rep. 704; see *Waldheim v. Ins. Co.* 28 N. Y. Supp. 766.

³ *Masonic Mutual, etc., v. McAuley*, 2 Mackey (D. C.) 70.

“an endowment fund to be paid to the persons entitled thereto” issued to one of its members a certificate of insurance by which it agreed to pay to his wife “or her legal representatives” a certain sum within sixty days after his death. The wife died, and thereafter, without making any change in the beneficiary, the member died. The legal representatives of the deceased wife then claimed the fund.

The supreme court of the District of Columbia held that this contract of insurance was a trust; that when the beneficiary died, the object of the trust failed, and there was a resulting trust to the member; that the case was analogous to a lapsed legacy, and that the words “or her legal representatives” were of no importance, inasmuch as those persons would have taken the fund in succession and by representation, if it had been vested in the beneficiary, whether expressly named by the member or not; but since the beneficiary’s death before the member’s prevented her ever taking any interest in the bequest, it followed that her executors or administrators could take no title thereto—that the fact that “her legal representatives” were named afterward did not indicate that they were to take as beneficiaries successively nominated; that there was but a single designation and that designation was to the wife alone; that the words “legal representatives,” as used in the certificate, had no signification different from that which is attributable to those words generally—namely, persons appointed either by will, or by the law, to administer upon the estate of a deceased person; and that the estate of the husband was entitled to the fund.¹ This decision, written by Justice Wylie of the court, was concurred in by Justice James, but Chief Justice Carter wrote a dissenting opinion in which he held that the contract of insurance was to be construed as any other contract, and that the doctrine of a lapsed legacy did not apply to such contracts.

By the terms of the constitution and by-laws of an association, members are entitled to participate in the benefit fund “with the right to hold, dispose of and fully control said benefit at all times.” A member had issued to him by the association a certificate in which he designated his wife as his beneficiary. She died, and afterward the member died without

¹ Washington Association v. Wood, 4 Mackey (D. C.) 19.

having disposed of the fund in any manner after her death. The court, in determining whether her or his administrator took the fund, said: "With this right at all times to hold, dispose of and control, his mere designation of some person to receive the benefit would be revocable. It would not prevent his subsequently designating some other person to receive it. While, in case of his death without having revoked his appointment of his wife, she would have been entitled to receive the benefit, yet during his life, because of the power of revocation, all that she had was a mere expectancy, dependent on his will and pleasure. That expectancy was not property, not estate. The expectancy terminated when she died, and did not pass to her administrator."¹ A certificate of membership provided for the payment of a certain sum within thirty days after due notice and satisfactory evidence of his death, to his wife, *or the legal representatives of the insured member*. The court held that the intention of the assured was that his wife should have the proceeds, in case she survived him, but, in case she did not, such proceeds were to go to his executor or administrator, to be distributed in due course of administration.² A certificate was payable to "Lorey E. Lyon, heirs, administrators, or assigns." She was the wife of the member, and died before him. There were no children of the marriage. It was held that the heirs of the member and not those of his wife, the beneficiary, were entitled to the benefit.³

§ 203. **When beneficiaries hold in joint tenancy with right of survivorship.**—Where there is nothing in the principles of government or policies of law opposed to the princi-

¹Richmond, Adm'r. v. Johnson, Adm'r, 28 Minn. 447; see Bickerton v. Jacques and Mutual Life, 28 Hun (N. Y.) 119; Tafel v. Supreme Commandery, 12 Cin. Law Bull. 35; Gutterson v. Gutterson, 50 Minn. 278; 52 N. W. Rep. 530; *contra*, Clark v. Aid Union, 6 Pa. Co. Repts. 321.

²Johnson v. Van Epps, 110 Ill. 551; 14 Ill. App. 201.

³Lyon v. Rolfe, 76 Mich. 146; 42 N. W. Rep. 1094; Silvers v. Association, 94 Mich. 39; 53 N. W. Rep. 935. It has been held in ordinary life insur-

ance contracts that where a husband, after the death of his wife, in whose favor he had insured his life, did not surrender the policy, and made no change in the beneficiary, the presumption was that he intended her personal representatives to take, and on his death the policy was payable to them, and not to his own personal representatives. Waldheim v. Ins. Co., 13 N. Y. Supp. 577; see U. S. Trust Co. v. Ins. Co., 115 N. Y. 157; 21 N. East. Rep. 1025; Foster v. Gile, 50 Wis. 603.

ple or doctrine of survivorship in joint tenancy, a contract of mutual benefit insurance, payable to the wife and daughter of the member, creates a joint tenancy in the beneficiaries, with the right of survivorship.¹ The law in such a case is analogous to the law relating to legacies and devises, where, on the death of a joint legatee or devisee, the survivor is entitled to the whole amount. When two persons are made the beneficiaries of an ordinary contract of insurance, they at once take a vested interest in it as tenants in common. On the death of one of them before the death of the insured, his heirs take his interest. But in mutual benefit insurance the expectant interest of the beneficiary lapses on his death prior to that of the member,² and when two persons are named as the beneficiaries of a contract of mutual benefit insurance, the survivor takes the fund, unless the policy of the law is opposed to the doctrine of survivorship in joint tenancy.

§ 204. **When a class of persons is designated to take the fund, the interests vest on the death of the member.**—When a class of persons is designated as the beneficiaries of a contract of insurance, all persons belonging to that class, in existence at the death of the member, take the fund in equal proportions immediately on his death, unless a contrary intent can be inferred from some particular language of the contract, or from such extrinsic facts as may be entitled to consideration in construing its provisions.³ The designation by a member of his children as his beneficiaries has reference to such children as may survive him, and not to the children in existence at the time of the designation. Where his “family” has been made the object of his provision, those of the family who survive the member are entitled to the benefit;⁴ and by the designation of his heirs, the member will be understood to mean that whoever may prove to be his heirs at his death shall take the fund.⁵ The fact that the society may not be required, under the terms of the contract, to pay the fund for a certain time after the death of the member, or proof of such death, does

¹ *Farr v. Grand Lodge*, 83 Wis. 446; 53 N. W. Rep. 738.

² See § 202.

³ *Campbell v. Rawdon*, 18 N. Y. 412; see *Chasmar v. Bucken*, 37 N. J. Eq. 415; §§ 186, 189, 192, 194.

⁴ *Brooklyn Association v. Hanson*, 6 N. Y. Supp. 161; 53 Hun 149; §§ 186, 187, 194.

⁵ §§ 189-192.

not alter the rule by fixing another time for the vesting of the interests; and if one of the class dies after the death of the member, and before payment of the fund, his proportionate interest descends to his administrator, and is not divided among the survivors of the class at the time of payment.¹ A contract of insurance is not void for uncertainty because the beneficiaries are designated generally as a class and not specifically by name. It is proper for a member to make his certificate payable generally to his heirs or to his children.²

§ 205. **The right to the fund vests immediately upon the death of the member.**—It is the well settled policy of the law to favor vested, rather than contingent, estates; the first, rather than the second, taker. This principle may be applied in determining the ownership of the benefit fund of a society, and it may be laid down as the rule that, unless it is otherwise provided in the contract, the right of the first named beneficiary to the fund vests at once and absolutely on the death of the member.³ Where the fund was payable at the death of the member "to his wife, and in case of her death," to his children, the right to the fund vested in the surviving wife immediately upon the death of the member, and upon her death passed as a part of her estate to her administrator.⁴ Under a certificate of a mutual benefit society, naming two persons as beneficiaries, and providing that, "in case of death of either, full amount to go to the survivor, if living; if not living, to the heirs of said member," if the member dies first, the benefit fund vests in them both; and if one of the beneficiaries dies before payment of the benefit is made, his share of the fund goes to his executor, not to the survivor.⁵ In passing upon this question the court said: "The time of pay-

¹ The case of *The Covenant Mutual Benefit Association v. Hoffman et al.*, 110 Ill. 603, is inconsistent with the doctrine as stated in the text, but it is manifestly wrong on this point; and it is also wrong in holding, under the facts stated in the opinion, that the widow is an heir of her deceased husband under the laws of Illinois. See note, § 190, where this case is quoted from.

² *Brooklyn Life v. Bledsoe*, 52 Ala. 538; see § 176.

³ *Aiken v. Association*, 13 N. Y. Supp. 579; *Chartrand v. Brace*, 16 Colo. 19; 26 Pac. Rep. 152; *Union v. Montgomery*, 70 Mich. 587; 38 N. W. Rep. 588.

⁴ *Chartrand v. Brace*, *supra*; Elliott, J., dissenting.

⁵ *Union Mutual Aid Ass'n v. Montgomery*, 70 Mich. 587; 38 N. W. Rep. 588; 14 West. Rep. 877.

ment provided for, namely, ninety days after the death of the member, has no reference to who shall take as survivor. The time of payment is defined simply to enable the corporation to raise the fund by assessment upon the members. If the son had died before his father, the whole sum would have been payable to the daughter, and, if she had also died before her father, the fund would have been payable to his heirs. The words 'if living,' and 'if not living' refer to living at the time of (the member's) death."¹

§ 206. **Death in common disaster—Survivorship—Presumptions.**—Where the member of a benefit association, whose certificate is payable to his wife, or, in case of her death in his lifetime, to his children, or, if there be no children, to his mother, and, if she be dead, to his father, and, failing all these, to his brothers and sisters, perishes in a flood with his wife and children, there is no presumption as to survivorship, but the widow's representative is entitled to the fund, in the absence of evidence that she died before her husband.²

¹ See *Continental Ins. Co. v. Webb*, 54 Ala. 688, and *Chartrand v. Brace*, 16 Colo. 19; 26 Pac. Rep. 152.

² *Cowman v. Rogers*, 73 Md. 403; 21 Atl. Rep. 64.

"By the Roman law, if a father and son perished together in the same shipwreck or battle, and the son was under age of puberty, it was presumed that he died first. but, if above that age, that he was the survivor, upon the principle that, in the former case, the elder is generally the more robust, and, in the latter, the younger. The Code Napoleon had regard to the ages of fifteen and sixty, presuming that, of those under the former age, the eldest survived, and that, of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male was presumed to have survived; if they were of the same sex, the presumption was in favor of the survivorship of

the younger. By the Mahometan law of India, when relatives thus perish together, it is to be presumed that they all died at the same moment; and such also was the rule of the ancient Danish law. But the common law, which governs us, knew no such arbitrary presumptions. By that law, where several lives are lost in the same disaster, there is no presumption of survivorship by reason of age or sex, nor is it presumed that all died at the same moment. Survivorship in such a case must be proved by the party asserting it. No presumption will be raised by balancing probabilities that there was a survivor, or who it was." *Wing v. Angrave*, 8 H. L. Cas. 183; *Underwood v. Wing*, 4 De Gex. M. & G. 633; *Johnson v. Merithew*, 80 Me. 111; 13 Atl. Rep. 132; *Newell v. Nichols*, 75 N. Y. 78; 1 Greenl. Ev., §§ 29, 30; *Best, Ev.*, 304; 2 Whart. Ev., §§ 1280-1282; 2 Kent, Comm., 572.

§ 207. **Death of member and beneficiary at the same instant of time.**—Where the by-laws provide that the fund shall be paid to the heirs of the member in case the beneficiary named in the certificate shall die before the member, the death of the member and the beneficiary at the same instant of time renders the latter as incapable of taking the fund as if he had died first, and the member's heirs are entitled to it.¹

§ 208. **Agreement between member and beneficiary as to the disposition to be made of the fund.**—Parol evidence is admissible to show that the beneficiary designated in a certificate, in consideration of such designation, promised the member that, after deducting from the benefit fund whatever sum of money might be due him from the member at the latter's death, he would pay the remainder to the heirs of the member. Such oral testimony is not in conflict with the written contract of insurance. It does not vary or control the contract between the deceased and the society, but shows another and an independent contract between him and the beneficiary. It is not offered to show that the beneficiary is not to receive the money, but to show what he is to do with it after he has received it.² Money left to a beneficiary to pay the debts of the insured is impressed with a trust which equity will enforce. It is always a question, however, to be decided by an inspection of the contract of insurance, whether the member may, during life, so far control the fund by the creation of a trust or otherwise, as to make it applicable to the payment of his debts after his death. Where he has merely the right to provide a fund to be disposed of by the general terms of the contract, or by the naked power of appointment, among certain classes of beneficiaries, such as the families, heirs or dependents of deceased members, and he has no property rights in such fund, he can not deal with it as property, and impress it with a trust for the payment of debts, as the impress of a trust upon the disposition of property necessarily presupposes an ownership of the property. Where a person procures his appointment as beneficiary by promising to dis-

¹ *Paden v. Briscoe*, 81 Texas 563; *matter of Morian*, 22 N. Y. St. Rep. 17 S. W. Rep. 42. 631; *Boasburg v. Cronan*, 7 N. Y.

² *Catland v. Hoyt*, 78 Me. 355; 5 Supp. 5. Atl. Rep. 775; 2 N. Eng. Rep. 876; In

tribute the fund among the creditors of the member after the death of the latter, and such a disposition of the fund is contrary to the terms of the contract, equity will lay hold of the fund and distribute it among those empowered and entitled to take it.¹

§ 209. **When beneficiaries take equally.**—Where a benefit is granted to several persons, and their respective proportions are not specified, the beneficiaries take equally.² Where a certificate of membership provides that the benefit shall at the death of the insured be paid to his wife and children, such benefit is payable to his wife and children equally. In such a case the wife is neither the inferior nor the superior of her joint beneficiaries, but is their equal, and the beneficiaries take by virtue of the contract, not by descent.³ Where a certificate of membership is made payable to the wife and children of the member, each child is entitled to receive his proportionate share of the benefit, although one of such children may never have lived with his father as a part of his father's family, and may also have received a portion of his father's estate prior to his father's death. The court, in thus deciding, said: "It must be supposed that this grand lodge understood the language which it used in the contract, and that it intended to make just the kind of contract which it did in fact make, and that it intended to bind itself to perform just what it agreed to perform, and did not intend to be bound by any secret arrangements, or settlements, or understandings previously entered into, or at any time existing between any of the members of the family. We think this grand lodge is simply bound to pay in accordance with the terms of its contract; and its contract says that it shall pay the fund to the wife and children of (the member insured), which according to all well-settled rules of construction means the wife and children

¹ Boasburg v. Cronan, 9 N. Y. Supp. 664. Gould v. Emerson, 99 Mass. 154; Jackson v. Nelson, 147 Mass. 300; 17 N.

² Wilburn v. Wilburn et al., 83 Ind. 55; Crockett v. Crockett, 2 Phillips, 553; Allen v. Hoyt, 5 Met. 324; see §§ 185, 204, 210. Baldwin, 15 R. I. 106; Seyton v. Satterthwaite, 34 L. R. Ch. D. 511; Grand Lodge v. Sater, 44 Mo. App.

³ Felix v. Grand Lodge, A. O. U. W. 31 Kan. 81; Wilburn v. Wilburn, 83 Ind. 55; Hamilton v. Pitcher, 53 Mo. 334; Cragin v. Cragin, 66 Me. 517; 445; *contra*, Young Men's Association v. Pollard, 3 Oh. Cir. Ct. Repts. 577.

equally.”¹ In *Hallan v. Gardner's Adm'r*,² the superior court held that, when the charter of a society appoints the widow and children of the member as his beneficiaries, but does not specify in what proportions they shall take the fund under a certificate issued by it, they take equally. But the court of appeals of Kentucky held otherwise in a case involving this point. Thus, the charter of a society provides that “the fund created for the benefit of the widow and children of a deceased member shall be paid to them,” but does not declare in what proportion each shall take. In *McLin v. Calvert*,³ it was held that the statutory rule as to distribution of the surplus of personalty of an intestate's estate should obtain in the distribution of a benefit fund derived from this society. The court said: “It is most natural and reasonable, as well as just, that when the policy and charter fail to make a complete provision for the distribution of the fund, the courts should adopt the statutory rule for the distribution of the surplus personalty of estates, and divide it as they would do if the money was the proceeds of a note or bond held by the decedent. * * This seems to us to be not only just, but what a large part, if not all, of those who insure for the benefit of their families, would understand to be the effect of the contract made with the insurance company; and in laying down this rule, we entertain little doubt that we are doing just what the insured would have directed to be done if the question had been propounded to him.”⁴ Where a member has made the children of his brothers and sisters the beneficiaries of his certificate, they will take *per capita* and not *per stirpes*.⁵ Where the fund is directed to be divided equally between the member's wife and children, the wife does not take one-half, and the children the other, but she takes the same share in the fund as each of the children, and no more.⁶

¹ *Felix v. Grand Lodge, A. O. U.* W. 31 Kan. 81; 1 Pac. Rep. 281; see §§ 185, 186.

² 5 Ky. Law Rep. 857.

³ 78 Ky. 472; *Kelley v. Ball* (Ky.), 19 S. W. Rep. 581.

⁴ See *Continental Life v. Palmer*, 42 Conn. 60; see also *Young Men's Mutual v. Pollard*, 3 Ohio Circuit 577.

⁵ *Malone v. Majors*, 27 Tenn. (8 Humap.) 577.

⁶ *In re Mary E. Morgan et al.*, 3 Demarest (N. Y.) 61; *Lord v. Moore*, 20 Conn. 122; *Myres v. Myres*, 23 How. Pr. 410; *Bunner v. Storm*, 1 Sand. Ch. 35; *Collins v. Hoxie*, 9 Paige 81; *Lee v. Lee*, 39 Barb. 172; *Murphy v. Harvey*, 4 Edw. 131.

§ 210. **In what proportion heirs take the fund.**—When gifts by will to heirs-at-law are made to them *simpliciter*, the persons to take, and the proportion which they shall take, must be determined by the statute of descent and distribution. The will in such a case not only designates who are to take, but also the *quantum* of the estate taken.¹ For the purpose of ascertaining the persons who are the beneficiaries under a designation of “my heirs,” it is necessary to consult the statutes of the state which cast the descent of the property of an intestate. But from this it does not follow that the statute determines the proportion of the fund which each heir shall take. When a member has made his certificate payable to his heirs, they do not take the fund by descent, but by contract. The statutes of descent and distribution cease to be of use, therefore, at the very moment when the heirs-at-law of the intestate have been found according to their provisions. They point out the persons whom the contract declares shall be the beneficiaries, but they do not determine the rights of such persons under the contract.² The rights of the beneficiaries in a certificate taken out by a member are such as the contract confers, and are not rights arising by operation of statutory rules. The contract, and not the statute, fixes their rights, and they have such rights only as the contract of insurance vests in them. We are, therefore, to look to the terms of the agreement, and not to the provisions of the statute, to ascertain the rights of the parties.³

Where a member of a society makes his certificate payable to his legal heirs, and dies, leaving a widow and children, the widow, where she is the heir of her husband and entitled to a larger part of his estate than any one of his children, is not the superior, or the inferior of her joint beneficiaries, but their equal. This is in harmony with the general principle that when a benefit is granted to several, and their respective proportions are not specified, the beneficiaries take equally.⁴

¹ Rawson v. Rawson, 52 Ill. 62; Young Men's Association v. Pollard, Richards v. Miller, 62 Ill. 417; Bas- 3 Oh. Circuit Ct. Repts. 577.
kin's Appeal, 3 Pa. St. 304.

² See § 209.

³ Silvers v. Association, 94 Mich. 553; Allen v. Hoyt, 5 Met. 324; Cragin 39; 53 N. W. Rep. 935; Wilburn v. v. Cragin, 66 Me. 517; Jackman v. Wilburn et al., 83 Ind. 55; *contra*, Nelson, 147 Mass. 300.

In *Gosling v. Caldwell*,¹ the contrary doctrine was held to be the law. A member of a society died leaving a widow, three children and two grandchildren, the children of a son who died before him. His certificate was payable to his legal heirs. The court held that the widow, the three children and the two grandchildren were entitled to the fund, and that "the chancellor's decree, giving one-fifth of the fund to the grandchildren, must be affirmed." Nothing further is said in the opinion as to the *quantum* which each beneficiary shall take under such a designation, than the language above quoted.²

In another case, the syllabus prepared by the court states that where the heirs of a member are made beneficiaries the money is payable in the proportions indicated by the statutes of distribution of the surplus personal property of his estate, but no question as to the proportion which each of the heirs should take, was raised, by anything shown in the opinion.³

¹ 69 Tenn. (1 Lea) 454.

² A statute of Tennessee provides that where a husband takes out a policy of insurance on his life, it shall on his death accrue to the benefit of his widow and heirs, to be divided between them according to the law of distribution, free from the claims of creditors. Whether that statute has any application to this case, where the policy is payable to the "legal heirs" of the insured or whether it is applicable only to cases where the policy is payable to the

estate of the insured, to his legal representatives, or to himself, is not stated in the opinion, but the case seems to have been decided without reference to this statute, both upon this point and the further point that those who take the personalty of an intestate, and not those who inherit his realty, are the beneficiaries under a designation of his "legal heirs," in a certificate of insurance. ³ *Leavitt v. Dann* (N. J. Err. & App.), 28 Atl. Rep. 590.

CHAPTER XIV.

CHANGE OF BENEFICIARY.

- § 211. Rights of beneficiary in ordinary contract of insurance.
212, 213. Beneficiary has no vested rights in contract of mutual benefit insurance.
214. Where no manner of changing beneficiaries has been agreed upon.
215. Provisions of the charter concerning changes of beneficiaries.
216. A change may not be made when the charter forbids it.
217. Where terms of by-laws or certificate prohibit a change.
218, 219. When mode of changing is prescribed, it must be substantially followed.
220. Authorities holding prescribed modes of changing beneficiaries to be mandatory and exclusive.
221. Authorities holding such provisions to be directory merely.
222. Change of beneficiary; general observations.
223. When the change is perfected.

§ 211. **Vested rights of the beneficiary in an ordinary policy of insurance.**—There is an irreconcilable conflict of the authorities upon the question of the rights and interest of the designated beneficiary in an ordinary policy of life insurance, and as to the extent to which the insured may control or change the ultimate destination of the proceeds of such a contract. The weight of authority is in favor of the doctrine that an ordinary life insurance policy is not the property of the assured, in any sense, but that such a contract, when once executed, vests in the beneficiary an absolute and indefeasible title to, and the whole beneficial interest in the policy and the money to become due under it. If a person insures his life for the benefit of another who is named as the beneficiary in the contract of insurance, the title of the beneficiary to the proceeds which may accrue from it is vested immediately upon the issuing of the policy, and there is no power in the person procuring the insurance to defeat that title by assigning or surrendering it. Although there is no obligation upon him, in the absence of a covenant to that effect, to continue to

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pay premiums on such a policy, yet if he does so, the benefit will accrue to the beneficiary. He brings the contract into existence, but it is held to be a contract between the company on the one part and his beneficiary on the other, to which he is, in some respects, a stranger.¹

Where the facts in the particular case constitute a valid executed gift of the policy, the title is vested in the beneficiary as irrevocably as the title to any other personal property would have been under the same circumstances. When the policy has been delivered to the beneficiary, or to some one for him,² when payment of some of the premiums has been made by the beneficiary,³ or when the beneficiary has taken out the insurance in the first instance for his own benefit, it is just and reasonable to hold that his rights are vested, indefeasible and irrevocable. But in some cases the broad doctrine is laid down that the rights of the beneficiary are indefeasible, even though the person whose life is insured pays the premium and keeps possession of the policy.⁴ In many courts, however, this doctrine has found no favor, and decisions holding that the beneficiary has only an inchoate interest in the policy, and that the ultimate enjoyment of its proceeds is dependent on the will and acts of the person procuring the insurance on his own life, are sustained by forcible arguments.⁵

¹ 2 Phillips Ins. p. 626, at sections Ill. 573; 44 Am. Repts. 94; 10 Ill. App. 2058, 2059, 2060; Bliss on Life Insurance, at section 318; Chapin v. Fellows, 36 Conn. 132; Lemon v. Ins. Co., 38 Conn. 294, Rawls v. Ins. Co., 27 N. Y. 282; Stillwell v. Ins. Co., 72 N. Y. 385-391; Washington Life v. Haney, 10 Kan. 525; Pence v. Makepeace, 65 Ind. 345; Wilburn v. Wilburn, 83 Ind. 55; Hutson v. Merri-
field, 51 Ind. 24; Ricker v. Ins. Co., 27 Minn. 195; 6 N. W. Rep. 771; 38 Am. Repts. 289; Allis v. Ware, 28 Minn. 166; 9 N. W. Rep. 666; Pilcher v. Ins. Co., 33 La. Ann. 332; Crittenden v. Ins. Co., 41 Mich. 442; Brockhaus v. Kemna, 7 Fed. Rep. 609; Valley Mutual v. Burke, 12 Ins. L. J. 337; 7 Vir. L. J. 173; Wilmaser v. Ins. Co., 66 Iowa 417; 23 N. W. Rep. 903; Glanz v. Gloeckler, 104 Ill. 484; N. A. L. Ins. Co. v. Wilson, 111 Mass. 542; Weston v. Richardson, 47 L. T. R. (N. S.) 514; Con 1. Mutual v. Baldwin, 15 R. I. 106; Pace v. Pace, 19 Fla. 438.
² Lemon v. Ins. Co., *supra*; Crittenden v. Ins. Co., *supra*.
³ Pilcher v. Ins. Co., *supra*.
⁴ Ricker v. Ins. Co., *supra*; Weston v. Richardson, *supra*; Glanz v. Gloeckler, *supra*; Stilwell v. Ins. Co., *supra*; Fowler v. Butterly, 78 N. Y. 68; Weisert v. Muehl, 81 Ky. 336; National Ins. Co. v. Haley, 78 Me. 268; Putnam v. Ins. Co., 42 La. Ann. 739; 7 So. Rep. 602; Garner v. Ins. Co., 110 N. Y. 266; Central Bank v. Hume, 128 U. S. 195.
⁵ Charter Oak v. Brant, 47 Mo. 419; Gamb v. Ins. Co., 50 Mo. 44; Clark

§ 212. **The beneficiary has no vested rights in a contract of mutual benefit insurance.**—So far as outward appearances may indicate, there is little difference between an ordinary policy of life insurance and a contract of mutual benefit insurance. But it has been held with substantial unanimity, whenever the question has arisen, that, in mutual benefit societies, the contract of insurance is between the society and the member, that the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member, until the death takes place, and that, during his life, therefore, the member may change his beneficiary without other limitations or restrictions than such as are imposed by the organic law, the articles of incorporation, the by-laws, or the certificates of the society. An analytical statement of the grounds upon which this rule rests seems never to have been made, and it is

v. Durand, 12 Wis. 248; *Kerman v. Howard*, 23 Wis. 108; *Foster v. Gile*, 50 Wis. 603; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Bickerton v. Jaques*, 28 Hun 119; 12 Abb. New Cases, 25; *Union Mutual v. Stevens*, 19 Fed. Rep. 671; In *Garner v. Germania Life Ins. Company*, 13 Daly 255, 17 Abb. New Cases 7, 32 Albany Law Journal 91, the common pleas court of New York says: "There may be many reasons why the right to transfer such an insurance from one beneficiary to another, even in the case of children, should exist. In the course of years this pecuniary condition may be materially improved by marriage, success in business or other causes, so that it may be more desirable and just that others who have claims upon the insurer and who are in greater need should have the benefit of the sum secured by the insurance instead of those for whom it was originally intended. When, therefore, the insurer keeps the policy entirely in his own possession, he alone paying the premiums, he should with the consent of the insurance company have the same right to revoke, alter or change it that he would

have in respect to a will; for, like the provisions in a will, it is a gift that is to take effect upon his death. He may of course put an end to it by ceasing to pay the annual premium; but there is no reason why his right should be limited to this, and that where for reasons satisfactory to him, he desires to transfer the benefit to another, he should have to lose all the premiums he may have paid over a long course of years, and be compelled to pay for a new policy the increased premium consequent upon his increase of years."

A careful analysis of all the cases cited in the notes to the above section will show that much of the apparent conflict of authority arises more from the different facts in each case than from any essential difference in principle. In some of the cases it is held that the particular circumstances clearly show the creation of an irrevocable trust in favor of the beneficiaries, but in others the rule is broadly laid down, irrespective of particular facts, that the whole beneficial interest vests in the beneficiary at the moment the policy is issued.

somewhat difficult to see why the insured should have any greater power to change his beneficiary under one system of insurance than under the other. It has been suggested that in the nature of a mutual benefit society there may be an inherent power to change the beneficiary. By this it is probably meant that the plan of insurance and object of such a society may require that the power to change his beneficiary from time to time shall be reserved to each member. It is the theory of this plan that it is "the poor man's insurance,"—that, while the benefit fund which the society will pay is comparatively small, it is given for what it costs,—that there are no profits and no unnecessary expenses,—that the benefit fund shall be paid to the family, dependents or other beneficiaries of the member in such manner and to such extent as he may desire it to be paid, not only when he takes out the certificate but at any time afterward when changes shall have taken place in his family, in his condition, or in his relations in life; and it is designed that changes in the designation of those whom he shall desire to be the objects of his provision, may be made by the act of the member at any time, without other expense or formality than such as may be prescribed by the contract of insurance.

It can not properly be said, however, that the power to change the beneficiary is inherent in such a society or that it is absolutely necessary for the carrying on of mutual benefit insurance. The law providing for the incorporation of such societies may prohibit a change in the beneficiary first agreed upon and designated,¹ or the articles of incorporation, by-laws, or certificate of membership may prohibit such a change. In both systems of insurance the rights and liabilities of the parties are fixed by the contract, and as a change of the beneficiary may be prohibited in contracts of mutual benefit insurance, so a power of disposition, or of appointment of a new beneficiary, may be reserved by the insured in an ordinary contract of life insurance.² In the contracts of mutual benefit

¹ See §§ 136, 172, 173; *Presbyterian Fund v. Allen*, 106 Ind. 595; 7 N. *Hutchings v. Miner*, 46 N. Y. 456; East. Rep. 317; *Kentucky Ins. Co. Hopkins v. Hopkins*, 92 Ky. 324; 17 v. *Miller*, 13 Bush 489; *Van Bibber v. S. W. Rep.* 864. *Van Bibber*, 82 Ky. 347.

² *Greeno v. Greeno*, 23 Hun 482;

insurance which were first brought to the attention of the courts the power to change the beneficiary was expressly given to the member, and, as the insured was a member of the society issuing the contract, paid the consideration for it, and had by its terms dominion over it, it was but natural to hold that the contract was between the society on the one part and the member on the other. The prevalent dissatisfaction with the rule of ordinary life insurance, which vests in the beneficiary the interest in the proceeds of the contract, and the manifest hardship and injustice which this rule gives rise to in many cases, made the courts eager to construe the contract of mutual benefit insurance in this way; and it may now be laid down as the well settled doctrine of the law that, where the contract of mutual benefit insurance does not take away the power to change the beneficiary, the member has that right, and all that a beneficiary has during the lifetime of the member, owing to this right of revocation and change, is a mere expectancy, dependent upon the will and act of the insured.¹ This expectancy is not property.²

§ 213. While policies of life insurance in ordinary companies are construed to be contracts between the company and the beneficiary, certificates of membership and policies of insurance in mutual benefit societies are held to be contracts

¹ This subject is discussed with Union Mutual v. Montgomery, 70 much force in Conyne v. Jones, 51 Mich. 587; 38 N. W. Rep. 588; Catholic Ill. App. 18; Masonic Mutual v. Burk- Association v. Priest, 46 Mich. hart, 110 Ind. 189; 10 N. East. Rep. 429; 9 N. W. Rep. 481; Maryland 79; Splawn v. Chew, 60 Texas 532; Society v. Clendenin, 44 Md. 429; 22 Aid Society v. Lewis, 9 Mo. App. Am. Rep. 52; Sabin v. Grand Lodge, 412; Ballou v. Gile, 50 Wis. 614; 7 134 N. Y. 423; 31 N. East. Rep. 1087; N. W. Rep. 561; Dietrich v. Madison 8 N. Y. Supp. 185; Schmidt v. Asso- Relief, 45 Wis. 84; Richmond v. ciation, 82 Iowa 304; 47 N. W. Rep. Johnson, 28 Minn. 447; 10 N. W. 1032; Masonic Association v. Bunch, Rep. 596; Eastman v. Provident 109 Mo. 560; 19 S. W. Rep. 25; Ben- Mutual, 20 Cent. L. J. 266; Gentry v. ton v. Brotherhood, 146 Ill. 570. Supreme Lodge, 20 Cent. L. J. 393; ² Masonic Mutual v. Burkhardt, *su- 23 Fed. Rep. 718; Presbyterian Fund pra*; Durian v. Verein, 7 Daly 168; v. Allen, 106 Ind. 583; 7 N. East. Tennessee Lodge v. Ladd, 5 Lea 716; Rep. 317; Hellenberg v. Independent Swift v. Association, 96 Ill. 309; Order, 94 N. Y. 580; Duvall v. Good- Knights v. Watson, 64 N. H. 517; 15 son, 79 Ky. 224; Johnson v. Van Atl. Rep. 125; 6 N. Eng. Rep. 888; Epps, 110 Ill. 551-558; Lamont v. Brown v. Grand Lodge, 80 Iowa 287; Grand Lodge, 31 Fed. Rep. 177; 45 N. W. Rep. 884.

between the society and the member whose life is insured. In *Masonic Mutual Benefit Society v. Burkhart*,¹ the court said: "The right to change the contract by mutual agreement of the parties is not derived from the charter and by-laws, but may be either directly or impliedly limited thereby. Unless the power to change is thus limited, the beneficiary named in a certificate of membership has no vested interest in the fund prior to the death of the member." Referring to the act of March 2, 1877, Rev. St. Ind. 1881, Sec. 3820, the court, in this case said: "That act declares that certificates of membership in charitable associations shall be regarded as contracts between the members and the association. Such certificates were contracts between the members and society before, precisely as they were after, the act. The statute was merely declaratory of what the law was in that respect from the beginning. Prior to the statute it was competent, however, for a charitable association, in its constitution and by-laws, to limit or prohibit the right to make changes in the names of beneficiaries after they had once been designated as such. Since the statute went into effect and became incorporated into the constitutions of such societies, no limitation or restriction repugnant to its terms can be imposed upon the society and its members by any regulation of the association."

In *Holland, Guardian, v. Taylor et al.*,² it is said: "If then, the Royal Arcanum were to be treated as an ordinary life insurance company, and the certificate as an ordinary life policy, it would be clear that * the assured had no authority, by will or otherwise, to change the beneficiary, or to, in any way, affect her rights without her consent. For many, and indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. The most usual difference is the power on the part of the assured in mutual benefit associations to change the beneficiary. But, as in either case, the rights of the beneficiary are dependent

¹ 110 Ind. 189; 10 N. East. Rep. 79; ² 111 Ind. 121; 12 N. East. Rep. 116;
11 N. East. Rep. 449. 9 West. Rep. 603.

upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the by-laws of the association, or by the terms of the certificate." In *The Presbyterian Mutual v. Allen*,¹ it is said: "The weight of authority * * is in favor of the general doctrine that beneficiaries may be changed in cases where policies, like the one before us, are issued by such associations as the present, and that, in this respect, such policies are not governed by the general rule, which governs ordinary insurance contract."²

A member of a mutual benefit society who has designated a person to receive the benefit to accrue upon his decease, may afterward designate another person. The one first designated can not claim as under a contract.³ In societies where the certificates are not contracts with the beneficiaries, the laws, rules and regulations in regard to beneficiaries may be changed during the continuance of the certificates, so as to limit and abridge their interests; and such limitations are not subject to objection as impairing vested rights, or the obligation of contracts.⁴ Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a certificate of membership, having no vested rights in such certificate and not being a party to the contract, can not complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the

¹ 106 Ind. 593.

² In *Block et al. v. Valley Mutual Insurance Company*, 52 Ark. 201, 12 S. W. Rep. 477, it is held that, in the absence of a statute making a distinction between a mutual insurance company and a mutual benefit society, the rights of a beneficiary must be ascertained by the terms of the contract of insurance, regardless of the character of the society; and that, where a contract of mutual benefit insurance does not otherwise provide, the beneficiary has a vested interest

in it. It is also held in this case, that a member of such a society has no right to change his beneficiary—no power of appointment or substitution—unless it is reserved in the certificate, by-laws or charter, of the society. See also *Johnson v. Hall*, 55 Ark. 210; 17 S. W. Rep. 874.

³ *Deady v. Association*, 49 N. Y. Super. Ct. 246.

⁴ *Durian v. Central Verein*, 7 Daly 168; *Southern Association v. Laudenbach*, 5 N. Y. Sup. p. 901.

certificate and receive a new one, with the consent of the beneficiary, was amended, so as to omit the consent of the beneficiary; nor can the beneficiary recover on the original certificate after it has been surrendered and a new one issued.¹ A certificate stated that it was a contract with the member alone, and not with the beneficiary, and that, during his membership, he might substitute another beneficiary by complying with the laws of the order on that subject. The member surrendered this certificate, and took out a new one, payable to other beneficiaries. The by-laws of the society, when the first certificate issued, provided for a change upon a surrender of the certificate, "with the consent of the beneficiary indorsed thereon;" but, before the second issued, the by-laws were amended by omitting the provision requiring such consent. It was claimed that, as the by-law existing when the certificate issued prohibited any change without the consent of the beneficiary, she took an interest in the certificate like an interest in an ordinary life policy, which could only be extinguished with her consent. The court said: "The contract was solely between her husband and the society. It reserved the right to change the beneficiary, if done in accordance with the by-laws of the order. The certificate bore notice of this upon its face. There was no agreement by the society, nor any promise by the husband, that the laws should not be altered. In the nature of things they were liable to be altered. * * The laws of the order referred to therein evidently mean the laws existing when the change is made; not those existing when the original certificate issued."² Where a provision of the charter or a by-law of the society constitutes part of the contract of insurance, its alteration without the consent of the member insured does not affect his contract.³

§ 214. When no manner or mode of changing the designation of the beneficiary has been agreed upon in the

¹ Byrne v. Casey, 70 Texas 247; 8 *supra*; Supreme Council v. Franke, S. W. Rep. 38; Supreme Council v. 137 Ill. 118; 27 N. East. Rep. 86; see Morrison, 16 R. I. 468; 17 Atl. Rep. §§ 136, 137. 57; Supreme Council v. Franke, 137 Ill. 118; 27 N. East. Rep. 86; Isgrigg v. Schooley, 125 Ind. 94; 25 N. East. Rep. 151; Catholic Knights v. Kuhn, 91 Tenn. 214; 18 S. W. Rep. 385.

² Supreme Council v. Morrison,

³ Morrison v. Odd Fellows, etc., 59 Wis. 162; Gundlach v. Association, 49 How. Pr. 190; Hysinger v. Supreme Lodge, 42 Mo. App. 627; see §§ 136, 137.

contract.—During his lifetime the member may change the designation of his beneficiary, or exercise the power of appointment of a new beneficiary, without other limitations or restrictions than such as are imposed by the organic law, the charter, the by-laws, or the certificate.¹ Where, therefore, no provision is made in the contract of insurance for changing the designation of the beneficiary, the change may be effected in any manner which may be agreed upon by the member and the society. It is not necessary, however, in such a case that the society shall be consulted. It has the right to provide reasonable rules and regulations on the subject, but if it does not do so, the member may make such a change as he desires, in any manner he may choose to adopt, provided he does not, in other respects, violate the contract of insurance, or the law of the land. Where a certificate was made payable to the member himself, and no provision was made in the contract for changing the beneficiary, an indorsement on the certificate, showing that he desired the benefit fund when collected to be distributed among certain beneficiaries, was held to be a sufficient change in the direction for payment of the fund.² Where no mode of changing the beneficiary is specified in the contract, though the practice is to require a surrender of the old certificate, and to issue a new one payable to the new beneficiary, a paper signed by the member, expressing his surrender of the certificate, directing payment to new beneficiaries, and mailed to the officers of the association just before his death, is a valid change of beneficiary, and will protect the association in making payment accordingly.³

If there is no provision of the charter, by-laws, or certificate of membership, governing the manner and mode in which such change shall be made, a designation of a new beneficiary may be made by the last will and testament of the member. When a power is reserved, and no mode of executing it is provided, it may be executed by will.⁴ When no such provision

¹ See §§ 166, 173, 212.

262; *Masonic Association v. Bunch*,

² *Masonic Mutual v. Burkhart*, 110 109 Mo. 560; 19 S. W. Rep. 25.

Ind. 189; 10 N. East. Rep. 79; 11 N. ³ *Hirschl v. Clark*, 81 Iowa 200; 47

East. Rep. 44; *St. Clair Co. Ben. Soc.* N. W. Rep. 78; see *Nally v. Nally*, 74

v. Fietsam, 97 Ill. 474; *Milner v. Bowman*, 119 Ind. 448; 21 N. East. Rep. ⁴ See § 236 *et seq.*; *Kaiser v. Kai-*

1094; see *Eppinger v. Russell*, 20 Fla. ser, 13 Daly 522; 24 N. Y. Weekly

is made, any mode of making the change or any form of words which may be selected to effect it, will be sufficient, if the intention of the member is clearly made known or set forth. Where a contract of insurance provides that the member may change his beneficiary at pleasure, but does not specify how such change shall be made, it merely expresses in direct language the construction which the courts would give to it unless restrictions were placed upon the right, and the member has control and dominion over the certificate, subject only to the provisions of the charter, concerning the classes who may become beneficiaries, and to the law of the land. He may, therefore, designate a new beneficiary by assignment of his certificate;¹ and such an assignment may be made by delivery without writing, if it sufficiently appears that the intention of the member by the delivery was to make the assignee his new beneficiary.² The charter, by-laws, or certificates of membership usually provide, in a definite manner, how the changes of beneficiaries shall be made, but there is no presumption that the right of the member to make such changes has in any wise been abridged. When, therefore, a change of beneficiaries is shown to have been made by the member, it will be presumed, in the absence of evidence to the contrary, that no manner or mode of making a change is specified in the contract, and that the change was properly made. The burden is on the first beneficiary to show that the new designation is invalid.³ On the other hand, there is no presumption that the member has exercised his right to change the beneficiary or appoint a new one, and the person named in the contract need not allege or prove that no other direction as to the payment of the fund had been made by him.⁴

Fig. 410; *Supreme Council v. Priest*, 46 Mich. 429; *Hannigan v. Ingraham*, 8 N. Y. Supp. 232.

¹ *Schmidt v. Association*, 82 Iowa 304; 47 N. W. Rep. 1032; *Martin v. Stubbings*, 126 Ill. 387; 18 N. East. Rep. 657; *Milner v. Bowman*, 119 Ind. 448; 21 N. East. Rep. 1094; § 165.

² *Marcus v. Ins. Co.*, 68 N. Y. 625; *Brown v. Mansur*, 64 N. H. 39; 5 Atl. Rep. 768; see § 167.

³ *Hicks v. Perry*, 140 Mass. 580; 5 N. East. Rep. 634; *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593; 7 N. East. Rep. 317; *Masonic Mutual v. Burkhardt*, 110 Ind. 189; 10 N. East. Rep. 79; 11 N. East. Rep. 449; 7 West. Rep. 527.
⁴ *Laudenschlager v. Association*, 26 Minn. 131.

§ 215. **Provisions of the charter concerning changes of beneficiaries.**—Where the charter of a society specifies the manner and mode of designating or changing the beneficiary, and the extent to which such changes may be made, these provisions must be strictly complied with, on the familiar ground that a corporation is the creature of its charter, and it is not within the power of the corporation or its members, or both, to waive a strict compliance with all such provisions.¹

Where its charter sets forth one condition on which a member may change the beneficiary of his insurance, the society may not, by the provisions of its by-laws or certificates, add other conditions to be performed before the right may be exercised. A charter gave the member a right, with the consent of the society, to make a change in his beneficiary. The by-laws provided that any member desiring to change his beneficiary should execute a certificate before a notary public or other proper officer, stating his name in full, number of his certificate, name and place of residence of the beneficiary whom he desired to substitute, name or names of those whom he desired to supersede, etc. A member executed a certificate which complied with all the specified requirements of the by-laws, except that it did not give the names of the beneficiaries to be superseded. It was claimed that this defect rendered the attempted change of no effect, but the court held that the material question was whether a change of beneficiaries had been made by the member with the consent of the society, and if it had, it was immaterial whether or not the requirements of the by-laws had been complied with.²

A by-law of an incorporated society, prescribing how the members shall direct the payment of the benefit fund, is not inconsistent with a provision of the charter that such fund shall be paid "as the member may direct," provided the rule prescribed by the society is reasonable for that purpose.³

§ 216. **A change of beneficiaries may not be made when the charter forbids it.**—It is a well established principle that

¹ *Head v. Ins. Co.*, 2 Cranch 127; 49 Hun 336; 17 N. Y. State Reporter, 1 Phillips' Insurance, pg. 3; *Leonard* 525; 2 N. Y. Supp. 79.

v. Ins. Co., 97 Ind. 299; *Bayse v.* ³ *Coleman v. Knights of Honor*, 18 Adams, 81 Ky. 368; see § 158. Mo. App, 189; see § 165.

² *Mayer v. Equitable Association*,

the provisions of its charter govern both the society and the member, and where its organic law, or its charter founded upon that law, prohibits a change in the beneficiary first agreed upon and designated, the member can not effect such a change. This prohibition is as effective when it is implied from the terms of the charter, as when it is contained in its express language. Thus, the charter of a society provides: "Upon the decease of any member of this association, the fund to which his family is entitled shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go: 1st. To the widow and infant children. 2d. To his mother and sister," etc. A member in his application directed that the fund should be paid to his two sons, and subsequently, with the consent of the society, but without the consent of the original beneficiaries, he designated his wife as the beneficiary. The court upon these facts said: "We can see no way to avoid the conclusion that this charter provision requires the benefit to be paid to the person named in the application, or to those specified, in case of the death of those persons or of some occurrence making it impossible to pay to them. Not only does the charter in direct terms declare that the benefit shall be paid to the persons thus named, but it also declares that if it becomes impossible to pay it to them, it shall go in the manner specified in the charter. The effect of these provisions is that the beneficiaries named must receive the money due on the policy, or it must be disposed of as provided by the charter creating the association. The provision respecting the mode of disposing of the benefit, deprives the insured and the insurer of any right to change the contract, as it leaves only two possible classes of beneficiaries, those named in the application and those specified in the charter, as entitled to take, in case the designation in the application is 'changed by death' or becomes 'otherwise impossible.'" ¹ Where the charter of a mutual benefit society provides that the fund due upon the death of a member shall be paid to his widow and children, and only gives the member the power to direct by will in what proportion it shall be divided between them, there can be no

¹ Presbyterian Fund v. Allen, 106 Ind. 593; 7 N. E. Rep. 317.

assignment of a certificate or change in the beneficiary, which will divest the widow and children of their rights.¹

§ 217. **Where the provisions of the by-laws or certificate prohibit the change.**—The member assents to the terms of insurance as set forth in the by-laws and in the certificate issued to him. Where, by such terms, the beneficiaries who shall take the fund, and the order in which they shall take it, are specified, the member has no power of direction. In *McClure v. Johnson*,² the benefit fund was, by the provisions of a by-law of the society, made payable to the “wife, husband, children, mother, sister, father or brother of such deceased member, and in the order above named,” and there was no provision of the contract of insurance, authorizing any other disposition of the fund. A member left a will by which he directed that the fund should be paid to a creditor, but the court held that he had no right to change the beneficiary, and that, under this by-law, his widow was entitled to it.

§ 218. **When the mode of changing the beneficiary is specified in the contract, it must be substantially followed.**—When a mutual benefit society has, under the powers and within the limits of its charter, provided in its by-laws a particular method of changing a beneficiary, or has set forth in its certificate a way by which the change may be made, no change of beneficiary may be made in any other mode or manner. The reason for this rule is not difficult to discover. It is based upon the familiar maxim that the expression of one thing excludes other and different things. When a society frames a set of rules providing for the distribution of a fund, and for the rights of beneficiaries and members, it must be assumed that it excludes every other mode and manner. Any other conclusion would lead to the most interminable confusion in the law applicable to the distribution of the insurance money, and fritter away, in the expenses of uncertain litigation, funds created for the benefit of widows, orphans and heirs. But there is still another reason. It can not be said that a beneficiary named in a certificate has no rights therein because he has no vested rights. The beneficiary has a right to the proceeds of the certificate

¹ Ky. Grangers' Mut. Ben. Soc. v. ² 56 Iowa 620.

Howe, 9 Ky. Law Rep. (Supr. Ct.)

198; see §§ 158, 165.

of insurance, subject to the right of the member to change the beneficiary according to the terms of the by-laws and regulations of the society, which are a part of the contract of insurance; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary and the society.¹ The power reserved to the member to change the beneficiary qualifies the right of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power to revoke the appointment continues; but this expectancy becomes an absolute right upon the death of the member, unless he has in the manner prescribed defeated it by the affirmative act of changing the beneficiary.

It can not truly be said that the interests of a beneficiary may be brought to an end at any time at the will of a member. It requires more than the will and the intention of the member to accomplish the change as may be seen in the following case: A contract of insurance required that any member desiring to make a direction as to payment of the benefit fund, different from that stated in the certificate, might do so in a prescribed form, to be attested by the recorder of the lodge, and reported to the grand lodge, upon the surrender of the old certificate. A member, believing himself to be dying, and desiring to change the designation from his sister to his wife, told a friend that he wished this change to be made, and asked him to have the forms gone through with. Before anything was actually done he died, and the benefit fund was declared to be the property of his sister.² It requires some affirmative act on the part of the member to change the designation; his will and intention will not work the change. All tendency to confusion and uncertainty is avoided by requiring this change to be made in conformity with the terms of the contract.

¹ *Mellows v. Mellows*, 61 N. H. 137; *Men's Mutual v. Brown*, 33 Fed. Rep. Coleman v. Supreme Lodge, 18 Mo. 11; *Supreme Council v. Smith*, 45 App. 189; *Holland, Guardian, v. Taylor*, 111 Ind. 121; 12 N. East. Rep.

² *Ireland v. Ireland*, 25 N. Y. 116; *Wendt v. Iowa Legion*, 72 Iowa Weekly Dig. 335; 42 Hun 212; see 682; 34 N. W. Rep. 470; *Stephenson Mellows v. Mellows*, *supra*; *Hall v. v. Stephenson*, 64 Iowa 534; *Hotel Merrill*, 47 Minn. 260.

As has been said, the power to appoint new beneficiaries is reserved to the member of a mutual benefit society, unless it is taken away by the express provision of the contract of insurance.¹ Where no mode of executing this power is provided, it may be executed in any manner which the member may choose to adopt.² But where the mode of executing the power is set forth in the contract, it is made a matter of substance, and, by every analogy to the law of general or special powers, it should be complied with. The authorities on this point are conflicting, but this seems to be the better rule.³

This rule should not be applied with too much particularity and exactness in matters of detail but should be substantially followed. Thus, by the terms of a contract, the fund was payable to certain persons in the order named, "unless otherwise ordered in writing by the deceased member, such order to be signed by two witnesses." By his will the member gave to his mother certain property, "including whatsoever sum may be due me or my executor from the Odd Fellows' Mutual Relief Association of the county of Strafford, as a member thereof." It was claimed by his mother that the will, though inoperative as a bequest of a fund which was not the property of the testator, was an order for the payment of the fund to her, within the meaning of the contract. As it was signed by two witnesses, referred to the fund as the subject-matter of his power of appointment, though by an erroneous description, and declared that his mother should be the payee of a fund, of which the society was the proper payor, it was held by the court that it was a sufficient order, though not addressed formally to the society, and that the fund was payable to the mother.⁴

¹ § 212.

² § 214.

³ *Holland v. Taylor*, 111 Ind. 121; 12 N. East Rep. 116; *Wendt v. Grand Lodge*, 72 Iowa 682; 34 N. W. Rep. 470; *Supreme Council v. Smith*, 45 N. J. Eq. 466; 17 Atl. Rep. 770; *Renk v. Herman Lodge*, 2 Demarest (N. Y.) 409; *Supreme Lodge v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826; *Stephenson v. Stephenson*, 64 Iowa 534; 21 N. W. Rep. 19; *Volman's Appeal*, 92 Pa. St. 50; *Hellenberg v. District No.*

1, 94 N. Y. 583; *Olmstead v. Masonic Mutual*, 37 Kan. 93; 14 Pac. Rep. 449; *Maryland Mutual v. Clendenin*, 44 Md. 433; *Arthur v. Association*, 29 Oh. St. 557; *Sanger v. Rothschild*, 123 N. Y. 577; 26 N. East Rep. 3; *Jinks v. Banner Lodge*, 139 Pa. St. 414; 21 Atl. Rep. 4; *Hall v. Association*, 47 Minn. 85; 49 N. W. Rep. 524; *Hotel Men's Mutual v. Brown*, 33 Fed. Rep. 11; *Rollins v. McHatton*, 16 Colo. 203.

⁴ *Dennett v. Kirk*, 59 N. H. 10; but see *Mellows v. Mellows*, 61 N. H. 137.

§ 219. It seems clear, however, that this rule should be held to apply only to those cases in which the original contract is in existence, and where an attempt was made by the member to change the beneficiary of that contract. Where the original contract has been surrendered by the member and abandoned by both parties to it, the member and the society, it is difficult to see what rights remain to the beneficiary under it. The member and the society have a right to change the terms of the contract by passing new by-laws, or otherwise, without the consent of the beneficiary,¹ and it is certainly competent for them to agree to abandon the contract and substitute a new one on substantially the same terms. They are the contracting parties, and the beneficiary has no vested interest until the moment of the death of the member during the continuance of the contract. Where the contract in which he had an expectant interest has been abandoned, and a new one has been taken out in its stead, payable to another, he has no legal ground of complaint. There is no longer a contract in which he is even contingently interested. In most of the cases where the original certificate had been surrendered, and a new one issued, payable to another person, the court considered the question raised by the first beneficiary, whether the change of beneficiaries had been made substantially according to the terms provided in the original contract. It would seem, however, that the first beneficiary, having had no vested interest in the original contract, had no legal right to urge that question, and it would also seem in those cases that the real question for the court to decide was whether there had been an abandonment of the original contract, and not whether there had been an abandonment of one contract and the substitution of another in the manner provided in the contract for the change of beneficiaries. The member and the society are the parties to a contract of mutual benefit insurance, and they may during the life of the member agree upon a change of

If the contract had merely said, considered a valid order, but the will "unless otherwise ordered in writing by the member," there might be some question as to whether a will, taking effect only at the death of the member, could be

was undoubtedly an order "in writing by the *deceased* member." for it took effect immediately upon his decease.

¹ See § 136.

beneficiaries in any manner which is satisfactory to both parties. When they have agreed upon a new beneficiary, a new contract is in force and, to the extent of the modification made, the old contract is abandoned and superseded.¹

When a society has accepted the surrender of a certificate from the member and issued a new one payable to a new beneficiary, or when a society has actually changed the beneficiary at the request of the member, all questions as to whether the manner and mode of changing beneficiaries provided in the contract have been followed are concluded and absolutely disposed of.² But where the society and the member did not, during the life of the member, agree upon a change of beneficiaries, where the original contract is in existence, and a right under it has accrued to some one, the original beneficiary will be heard to insist that he is entitled to the proceeds of it because the power of appointment of another person in his stead was not made by the member, one of the parties to it, according to its provisions. To this extent and no further does the rule apply that when the mode of changing the beneficiary is specified in the contract, it must be substantially followed.³

¹ See §§ 222a, 223.

² *Titsworth v. Titsworth*, 40 Kan. 571; 20 Pac. Rep. 213; *Barton v. Association*, 63 N. H. 535; *Gladding v. Gladding*, 9 N. Y. Supp. 880; *Lamont v. Association*, 30 Fed. Rep. 817; *Simcoke v. Grand Lodge*, 84 Iowa 383; 51 N. W. Rep. 8; *Bowman v. Moore*, 87 Cal. 306; 25 Pac. Rep. 409. In most of these cases it was held that there had been a substantial compliance with the terms of the contract relative to changing beneficiaries, but the logic of the cases sustains the doctrine as laid down in the text. In *Coleman v. Supreme Lodge*, 18 Mo. App. 189, it was held that the beneficiary named in the old certificate was not deprived of her rights, and that the society was not made liable by the issue of a new certificate in place of the old one, when the change of beneficiaries had not been made according to the prescribed manner.

But this decision is against the fundamental principle of mutual benefit insurance, that the contract is between the member and the society, and that the beneficiary has no vested interest in the contract during the life of the member. This case, though an early one, has never been followed.

³ In *Supreme Conclave v. Capella*, 41 Fed. Rep. 1, where it was held that the original beneficiary may not avail himself of his own misconduct to allege that the insured did not comply with the requirements of the contract, the court treated at some length the subject of changing the beneficiary. It was there said that the general rule that the member is bound to make such change in the manner pointed out in the contract, is subject to three exceptions: *First*. If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the mem-

§ 220. **Authorities holding provisions of the contract, directing the mode of changing beneficiaries, to be mandatory and exclusive.**¹—If the contract of a society points out the mode in which a change in the designation of the beneficiary is to be made, and that mode is not followed, an at-

ber to have a change made, has issued a new certificate, the original beneficiary will not be heard to complain that the course prescribed by the contract was not pursued: citing *Martin v. Stubbings*, 126 Ill. 387; 18 N. East. Rep. 657; *Splawn v. Chew*, 60 Texas 532; *Manning v. A. O. U. W.*, 86 Ky. 136; 5 S. W. Rep. 385; *National Mutual v. Lupold*, 101 Pa. St. 111; *Brown v. Mansur*, 64 N. H. 39; 5 Atl. Rep. 768; *Knights of Honor v. Watson*, 64 N. H. 517; 15 Atl. Rep. 125; *Byrne v. Casey*, 70 Tex. 247; 8 S. W. Rep. 38; *Titsworth v. Titsworth*, 40 Kan. 571; 20 Pac. Rep. 213. *Second.* If it be beyond the power of the member to comply literally with the contract, a court of equity will treat the change as having been legally made; citing *Grand Lodge v. Child*, 70 Mich. 163; 38 N. W. Rep. 1. *Third.* If the insured has pursued the course pointed out by the contract, and has done all in his power to make the change, but before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued, citing *National Association v. Kirgin*, 28 Mo. App. 80; *Mayer v. Association*, 2 N. Y. Supp. 79; *Supreme Lodge v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826; *Kepler v. Supreme Lodge*, 45 Hun 274. Of the authorities cited to sustain the first exception, *Martin v. Stubbings*, *National Mutual v. Lupold* and *Brown v. Mansur*, relate to the assignment of certificates, which is entirely different from appointing a new beneficiary; see §§ 166, 167, 169, 173, and they are

treated of in their proper place. In *Byrne v. Casey* the right to make the change, not the manner in which it was made, was in question. In *Knights of Honor v. Watson*, the controversy was as to whether the new beneficiary was a proper one under the charter. *Titsworth v. Titsworth* sustains the exception. With respect to the other exceptions, it may be said, with all due deference to the learned judge who wrote the opinion, that the second is too broadly stated, and that they are not, properly speaking, exceptions to the general rule laid down, but are rather classes of cases in which, upon a proper showing, a court of equity will afford relief against the performance of impossibilities, when the party seeking relief has done all that he can do in carrying out of the contract, or will consider that done which ought to have been done and which the moving party tried in every way required of him to cause to be done. No relief could be afforded in a common law action in either of the cases, and hence, they are rather matters of equity jurisdiction than exceptions to the rule; see § 223.

¹ In the following cases the original certificate was outstanding at the date of the death of the member and was not modified by the consent of the society, and the question was whether the change of beneficiaries was made by the member in such a way as to cut off the rights of the beneficiary named in the original contract.

tempt by a member to make such a change, and to dispose of the benefit fund by his last will is wholly ineffectual.¹

An association organized under the laws of Kansas for the purpose of giving aid to the widows, orphans and dependents of deceased members issued a certificate of membership payable to the member's wife, or her legal representatives. The wife died in the lifetime of the member. In the by-laws and certificate of membership no provision was made for a change of beneficiary, but section 76, chapter 93, Laws of Kansas, 1871, provides that "in case any life insurance company organized under the laws of this state shall have issued, or may hereafter issue, any policy of insurance upon the life of any person or persons for another's benefit, and such beneficiary dies during the lifetime of the person or persons whose life or lives are assured by said insurance policy or policies, then it shall be lawful for such company to receive from the person or persons whose lives are assured an affidavit setting forth the facts in the case; and if it shall appear from such affidavit that the affiants have theretofore paid the annual premium on such policy or policies, and intended thereby to insure for the benefit of the person or persons named in such policy or policies as beneficiary, that such person or persons are dead, and that said policy or policies have not been assigned or transferred to any person or persons, and nominating or appointing some other person or persons as beneficiary in place of the said deceased in said policy or policies named, it shall then be the duty of said insurance company to take up and cancel said policies at the request of said assured, and issue in like terms another policy or policies upon the life or lives of said insured for the benefit of the beneficiary in said affidavit nominated." The member after the death of his wife made no affidavit as prescribed in said section, nor did he take any steps to appoint any person as beneficiary in place of his deceased wife, except that he undertook to dispose of the benefit arising from his membership by will. The supreme court of Kansas held that

¹ Renk v. Herman Lodge, 2 Dema- Vollman's Appeal, 92 Pa. St. 50; rest (N. Y.) 409; Hellenberg v. I. O. B. Stephenson v. Stephenson, 64 Iowa, B., 94 N. Y. 580; McCarthy v. Su- 534; 21 N. W. Rep. 19; Mellows v. preme Lodge, 153 Mass. 314; 26 N. Mellows, 61 N. H. 137; Olmstead v. East. Rep. 866; Holland v. Taylor, Society, 37 Kan. 93; *contra*, Splawn 111 Ind. 121; 12 N. East. Rep. 116; v. Chew, 60 Texas 532; see § 220.

the will was ineffectual to dispose of the money payable on account of his death, or to divert the same from the legal representatives of his deceased wife, and, in deciding the question, said: "This statute applies to the defendant society. It was enacted prior to the making of the contract in question, and the parties must be held to have contracted with reference to it. It prescribes the manner by which the member may designate a beneficiary where the one first appointed has deceased; and it appears to be the only mode prescribed. We think the maxim, *expressio unius est exclusio alterius*, applies; and, as the prescribed mode has not been followed, no change was actually made, and therefore the benefit must be paid according to the terms of the contract. The assured has no interest in the benefit resulting from his membership. In no event was it payable to him, nor could it become a part of his estate; and, having no interest in the fund, what was there for him to bequeath?"¹

The by-laws of a society provided that a member who desired to change the beneficiary named by him might surrender his certificate duly indorsed, and procure a new certificate to be issued, payable to the new beneficiary. A member just before his death gave the following direction: "To Herman Lodge, etc., officers and members: Please take notice that I do hereby revoke the direction given in my benefit certificate in reference, as to whom the money should after my death be paid, and I do hereby order and direct that the money be divided as directed by me in my last will and testament, executed by me, on the 17th of October, 1882." This direction was signed by the member. The court held that it and his last will were inoperative and ineffectual, that the change could only be made by a compliance with the terms of the by-laws.² A contract provided that the fund should go to certain persons in the order named, "unless otherwise ordered in writing by the deceased member, such order to be signed by two witnesses and acknowledged before a justice of the peace." The member left a will by which he attempted to dispose of

¹ Olmstead v. Society, 37 Kan. 93; ² Renk v. Herman Lodge, 2 Dem-referred to and commented on in arest (N. Y.) 409.
Titsworth v. Titsworth, 40 Kan. 571;
20 Pac. Rep. 213.

the fund. It was signed by two witnesses, but was not acknowledged before a justice of the peace, and it was held to be inoperative.¹

A certificate was payable to the wife, or to the children of the member, or if he left neither wife nor children, to such person "as he may have formally designated to his said lodge prior to his decease." He left neither wife nor children. By his last will he designated his brother as the beneficiary of the insurance, but the court held that this was not such a designation as was contemplated by the contract and that the fund lapsed to the society.²

§ 220a. A member held a certificate payable to his daughter. After his second marriage he inserted immediately after her name the words "and my wife." The by-laws of the society provided: "A member in good standing may at any time, surrender his relief-fund certificate, and a new certificate shall thereafter be issued, payable to such person or persons as the member may direct." The beneficiary could only be changed by surrendering the certificate to the society as provided in its by-laws, and his widow on his death

¹ *Mellows v. Mellows*, 61 N. H. 131. In this case it was said: "The contract does not expressly allow the power of appointment to be exercised by an order executed in a manner deemed by a court or jury, equivalent in utility to the prescribed form. The object of the association is the payment of a certain amount of life insurance, after the death of each member; and it may reasonably be inferred that, for a substitutional appointment, a written and acknowledged order signed by two witnesses is required, not merely as evidence satisfactory to the payer, but as such a protection of each member and the payees named in the contract, as the law provides for an owner of property and for his heirs, in the execution of a will or codicil. It might be claimed that anything shown by competent evidence to have been regarded by the parties, when they made the con-

tract, as mere matter of form, the law would not treat as matter of substance. But an acknowledgment of a substitutional order before a justice of the peace, might in fact be a material safeguard for the member making it, and for the beneficiaries named in the rules and displaced by the order; and the contract does not authorize any tribunal to dispense with any proceeding exacted by the contract, as a substantial security of the rights of those parties. If acknowledgment could be omitted as a useless form, there is no ground of law on which two witnesses, or a signed writing, could be required. The will is not such an order as the contract demands." See *Planter's Ins. Co. v. Bank*, 63 Ala. 585; *Dane v. Young*, 61 Me. 160.

² *Hollenberg v. I. O. O. B.*, 94 N. Y. 583; see § 237.

acquired no title to any part of the benefit fund on account of his alteration of the certificate.¹ Where a certificate provides that upon the death of the assured the sum mentioned will be paid to assured's wife as directed by the application, or to such person "as he may subsequently direct by change of beneficiary entered upon the record of the supreme secretary," a mere delivery of the certificate by the assured, after the death of the wife, to a third person for the benefit of his son, is not a change of beneficiaries.²

The by-laws of a society provided that a member might change his beneficiary by surrendering his certificate, and receiving a new one payable according to his directions, "said surrender and directions to be made on the back of the benefit certificate surrendered, signed by the member and attested by the reporter under seal of the lodge." The printed form on the back of a member's certificate was filled up and signed by him, making it payable to another person than the one named in the certificate, but it was not attested by the reporter. After the death of the member, the certificate was found thus indorsed among his papers together with a letter as follows: "Port Huron, March 25, 1884. Reporter of Integrity Lodge, Knights of Honor, Sir:—I desire to have the beneficiary in my certificate of membership changed from Mrs. F. F. Richardson to George K. Nairn, in trust; and in the event of my death, two thousand dollars to be paid to him. Harry Traver." Upon these facts, the supreme court of Michigan said: "In our opinion, Traver never surrendered this certificate, and never attempted to surrender it, within either the letter or the spirit of its conditions, and the right of Mrs. Richardson remains as originally provided for. * * We dispose of the case purely on legal grounds which leave us, in our opinion, no choice in the matter. The contract is one which the parties made on their own conditions, and every one is bound by them."³ A certificate of membership stipulated that the supreme lodge would pay a certain sum of money to such person or persons as the member might by will or entry on the rec-

¹ Thomas v. Thomas, 15 N. Y. Supp. 15; 131 N. Y. 205.

³ Supreme Lodge v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826.

² Rollins v. McHatton, 16 Colo. 203; 27 Pac. Rep. 254.

ord of the lodge, or on the face of the certificate direct the same to be paid, etc. On the face of the certificate the member directed that the fund be paid to his sister. There was found in his pocket the day before his death, the following writing signed by him: "To my dear wife: I want you to have all my effects, everything. I give everything to my wife." The supreme court of Illinois held that, as the member had by previous indorsement disposed of the benefit fund by directing to whom it should be paid, in the precise mode in which the rules of the lodge required the direction to be made, this writing addressed to the wife did not operate to dispose of the benefit.¹

By section 7 of article 2 of the constitution of a society, it is provided that any member wishing to change his beneficiary must procure a blank form from the secretary, which, being filled out and properly attested, shall be returned to the secretary, when the necessary changes will be made on its books. A member named his wife as his beneficiary in his application for membership, and her name was so entered in the books of the society. Subsequently he executed a paper assigning his certificate to one of his creditors as collateral security for his debt, but the assignment was not made upon the prescribed blank, and the society had no notice of it until after the death of the member, when both the widow and the assignee claimed the benefit fund. The court held that the widow was entitled to it, and in its opinion said: "In the case of *Lamont v. Association*,² the assured had during his lifetime changed his beneficiary, and the change had been accepted by the company and entered on its books, and it was held that this transfer was operative, and divested the rights of the beneficiary named in the application; but in that case the provisions of section 7, article 2, had been substantially complied with. Here there has been no attempt to effectuate a change of beneficiary by a compliance with the terms of this section 7. It will be noted that the constitutional provision for a change of beneficiary says it *must* be done on a prescribed form of blank, which is given in the by-laws, which also require the signature

¹ *Highland v. Highland*, 109 Ill. 366; see *Elsev v. Odd Fellows*, 142 Mass. 224; 7 N. East. Rep. 844. ² 30 Fed. Rep. 817.

to be attested by an acknowledgment before a notary public or justice of the peace; and the application for membership signed by the assured in this case stipulates that the receipt of the parties to whom he designates his death loss to be paid shall be a full satisfaction of all claims that any of his heirs or assigns may have upon the association. Here is a very cogent reason why, if the beneficiary is changed, it shall be done according to the forms prescribed. This mode of transferring the fund or changing the beneficiary was undoubtedly adopted in order to secure certainty as to who was entitled to the payment of the death loss, that the association might know on the death of a member whom they could safely deal with. There can be no doubt, I think, but that a voluntary association of this kind can prescribe the manner in which its benefits may be assigned or transferred and that these regulations become a part of the contract. * * A transfer, to be valid, must conform to the mode in which the constitution and by-laws of the company say it may be changed. Any attempt to make such a transfer should be strictly construed. The application for membership designated the wife of the assured as his beneficiary, and she was so designated on the books of the association. This made a contract in her favor on which a suit could have been maintained for this death loss. The constitution and by-laws of the association provided a mode by which her right to this benefit fund could be divested; but, in order to so divest it, that mode must be strictly followed. It was not so followed, and hence I am of opinion that what was done in that direction was not operative to divest her of her right.”¹

§ 221. **Authorities holding such provisions of the by-laws or certificate to be directory merely.**—As has been said, the authorities are not by any means unanimous on this point, and those holding that such prescribed methods are directory merely are here given. A by-law of a society provided: “Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents.” A member took out a policy payable to his father and mother.

¹ Hotel Men's Mutual v. Brown, 33 Fed. Rep. 11.

Without attempting to make any change of beneficiaries as provided in this by-law, he made a will bequeathing the proceeds of his certificate to his wife and children, and soon afterward died. The benefit fund was by agreement of parties placed in bank by the association, subject to the judgment of the court in the suit between the father and mother, on the one hand, and the executors of the will and guardians of the children, on the other hand. In discussing the above by-law and its effect on the change of beneficiaries, the court said: "A method by which he may accomplish the change to the satisfaction of the order is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of affecting the same object. The design of this section is to protect the interests of the corporation. The company are entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. * * As a by-law of the order, this provision entered into the understanding between the company and the member effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company, to be insisted upon or waived according to their election. The provision in the by-laws of the Legion of Honor as to changing the beneficiaries of a benefit certificate is not peremptory, but merely points out a method which shall satisfy the company as to the parties entitled to receive the benefit money. The suit is not between the claimant of this money and the corporation by whom it is to be paid, and the latter does not object to the manner in which the change of beneficiaries was made. The exact case before us seems to be one of first impression; we have been furnished with no authorities precisely in point by the able and distinguished counsel who have represented the respective parties to the cause, although their briefs show great research for that purpose, nor have we been able to find any bearing upon the question. * * We think that as between the parties to this suit the change of beneficiaries was fully effected by the will."¹

¹ Splawn v. Chew, 60 Texas, 532.

A member of a society had a certificate issued, payable to his brother, and left it in charge of the subordinate lodge to which he belonged. He afterward married, and wrote to the proper officer: "Please find inclosed my dues of lodge No. 2, A. O. U. W., three dollars; and in return please send my policy made out to Mrs. Josie A. Manning." By a law of the order it was provided: "Any member holding a beneficiary certificate desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, with the seal of the lodge attached, and by the payment to the supreme or grand lodge of the sum of fifty cents; but no change of direction shall be valid or have any binding force or effect, until said change shall have been reported to the supreme or grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon." The member neglected to forward the requisite fee of fifty cents for making the change, and the proper officer of the lodge wrote to him, requesting him to furnish it. He died without having done so, and nothing was done in the matter prior to the member's death. Afterward the society issued to Josie A. Manning a certificate, and paid her the fund provided for. The court said: "The intention of the assured was to change the benefit. He so directed in writing, and now, because he did not do so in the formal manner prescribed by the law for the benefit of the order, it is asked by a third party whose interest in the insurance was liable to end at any time at the will of the assured, that his intention shall be defeated, although the party for whose benefit the form was prescribed has seen proper to waive it. Such a rule would sacrifice substantial justice to mere form; it would tend to defeat the benevolent aim and purpose of the organization, and the desire and intention of the assured. Members of the order may be remote from their lodge; they may not have their certificates with them, and, therefore, be unable to make the indorsement thereon as directed, or to have it attested by the recorder of their lodge, or its seal attached thereto. If appellee chooses to waive these formalities, it does not lie in the mouth of a third party to complain."¹

¹Manning v. A. O. U. W., 86 Ky. 136; 5 S. W. Rep. 385. This case in effect declares that the society may, after the death of a

§ 222. *Change of beneficiary—General observations.*—

The society has a right to provide in its contracts a certain and uniform method of transacting its business, and, to require its members to change their beneficiaries in the prescribed manner. As we 'have seen' the member and the society may during the life of the member waive these requirements, and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties. It does not follow, however, that after the death of a member, the society may waive these requirements and recognize as valid an attempted change of beneficiaries made by the member in a manner different from that set forth in the contract. The rights of the parties are controlled by the contract as it was at the date of the death of the member, and, after these rights have attached by the death of the member, no consent, or act of the society can defeat or even affect them. The beneficiary of a contract of insurance, who is affected by an attempted change of beneficiaries, may avail himself of the failure of the insured to comply with the terms of the contract specifying the manner in which it may be made, as well as the society which issued the contract.² The payment of the fund into court for the benefit of the person who may be declared to be entitled to it, in no way improves or prejudices the legal position of either the original or the substituted beneficiary. On the contrary, the party who would succeed as against the other must make a case which would entitle him to succeed against the society in a suit on the contract.³

member, waive a want of compliance on his part with the terms of the contract, even though it refused to do so in his lifetime, and that by such waiver and the issue of a new certificate after his death, the original beneficiary is deprived of his rights, in spite of the fact that the contract expressly provides that no direction for a change shall be valid until a new benefit certificate shall have been issued. This certainly can not be the law. See § 222; see § 227, note; see *Hall v. Association*, 47 Minn. 85.

¹ § 219.

² *Wendt v. Iowa Legion*, 72 Iowa 682; 34 N. W. Rep. 470; *National Mutual v. Lupold*, 101 Pa. St. 111; *contra*, *Splawn v. Chew*, 60 Texas 532; *Manning v. A. O. U. W.*, 86 Ky. 136; S. W. Rep. 385; see § 221.

³ See § 354; *Wendt v. Iowa Legion*, *supra*; *Mellows v. Mellows*, 61 N. H. 137; *Holland v. Taylor*, 111 Ind. 121; 12 N. East. Rep. 116; *Hotel Men's Mutual v. Brown*, 33 Fed. Rep. 11; *Ireland v. Ireland*, 42 Hun 212; *Supreme Lodge v. Nairn*, 60 Mich. 44; *Stephenson v. Stephenson*, 64 Iowa, 534; *Vollman's Appeal*, 92 Pa. St. 50; *Ballou v. Gile*, 50 Wis. 619. In *Titsworth*

§ 222a. In some cases the attempted change of the beneficiary was not called to the notice of the society until after the death of the member, so that the consent of the society to the change was not an element in the questions before the court;¹ and, with one exception,² such cases hold that the change, to be effectual, must be made in compliance with the terms of the certificate, or the by-laws of the society; that the right to object to the method and validity of the attempted change is not limited to the society, but that the beneficiary named in the certificate will be heard to show that his expectancy was not cut off by the deceased member in the manner prescribed in the contract. In one case the attempted change was called to the notice of some of the officers of the society and witnessed by them, but it was held to be ineffectual for want of compliance with the express terms of the contract, no new agreement between the member and the society being shown.³ In *Hotel Men's Mutual Benefit Association v. Brown*, *supra*, stress is laid on the fact that the terms of the contract provide that the change *must* be made in a certain manner;⁴ and in *Splawn v. Chew*, *supra*, attention is called to the fact that the provision of the contract is that a member *may* change his beneficiary in the manner prescribed. In the latter case it is held that such a provision is merely permissive.⁵ In other cases⁶ the contracts stipulate that "any member

v. Titsworth, 40 Kan. 571; 20 Pac. Rep. 213, where a new certificate had been issued in place of the original, it was said in the course of the opinion: "The society has paid the money into court, and has been released from all obligations respecting it. This payment, however, is an admission on its part that the benefit certificate was rightfully issued, and hence all contention as to whether its rules and regulations respecting these matters had been complied with is out of the case and entirely disposed of." See *Splawn v. Chew*, 60 Texas, 532.

¹ *Holland v. Taylor*, *supra*; *Supreme Lodge v. Nairn*, *supra*; *Hotel Men's Mutual v. Brown*, *supra*; *Vollman's Appeal*, *supra*; *Hellenberg v.*

District No. 1, 94 N. Y. 580; *Splawn v. Chew*, 60 Texas 532; *Supreme Council v. Smith*, 45 N. J. Eq. 466; 17 Atl. Rep. 770; *Wendt v. Iowa Legion*, *supra*; *Mellows v. Mellows*, 61 N. H. 137; see § 219.

² *Splawn v. Chew*, *supra*.

³ *Renk v. Herrman Lodge*, 2 Demarest 499.

⁴ See also *Supreme Council v. Smith*, *supra*.

⁵ See *Titsworth v. Titsworth*, 40 Kan. 571; 20 Pac. Rep. 213, where the reasoning and conclusion of *Splawn v. Chew*, *supra*, is adopted.

⁶ *Vollman's Appeal*, 92 Pa. St. 50; *Stephenson v. Stephenson*, 64 Iowa 534; *Holland v. Taylor*, 111 Ind. 121; 12 N. East. Rep. 116; *Highland v. Highland*, 109 Ill. 366.

may change" his beneficiary in the mode prescribed, and while the particular language is not commented upon, it is held that the change can not be effected by any other method. The case of *Coleman v. Supreme Lodge, supra*, holds that the provision that "a member may change his beneficiary" in a prescribed manner, is exclusive of all other ways, on the familiar ground that the expression of one thing is necessarily the exclusion of another and a different thing.

§ 223. **When the change of beneficiaries is perfected.**—When a member has done all that he is required to do under the contract to effect a change of beneficiaries, the change will be deemed complete, even though some ministerial acts of the officers of the society are still to be performed. A by-law of a society provided that a "member in good standing may surrender his benefit certificate and have a new one issued by paying a fee of fifty cents." A member, having met with a serious accident, sent a friend to a meeting of his lodge to have a change made in the designation of the beneficiary. This friend attended the meeting of the lodge, surrendered the certificate to the secretary of the lodge, requested him to issue a new certificate payable to the member's wife, and paid the fee of fifty cents. A minute of the transaction was made in the record of the proceedings of the lodge for that evening. On the following day the member died. On the day following his death, the secretary of the lodge surrendered his certificate to the secretary of the supreme lodge, which alone could issue benefit certificates, requested a new certificate to be issued, naming the member's wife as the new beneficiary, and paid the fee of fifty cents therefor. This was done, and on the same day the secretary of the lodge delivered the new certificate to the new beneficiary. When the new certificate was issued neither secretary knew that the member had died on the preceding day. In commenting upon these facts the court said: "Although the laws of the organization do not prescribe the precise manner in which a member of a subordinate association shall proceed in order to surrender a certificate and have a new one issued changing the beneficiary, yet it sufficiently appears that a member of the order, who is a member of a subordinate association, receives his certificate, settles his dues and surrenders his certificate through his subordinate association. In fact

there is nothing in the constitution and laws of this organization, which indicates that it differs at all in this respect from numerous other organizations of this kind, with which the courts have to deal judicially, which is composed of a supreme governing body, and subordinate associations or lodges. It is not necessary to set out the provisions of its constitution and statutes in detail; it is sufficient to say that it is a reasonable conclusion from their provisions that (the member) could only surrender his benefit certificate for the purpose of having a new one issued, changing his beneficiary, through his subordinate association, and that he could not have done it by dealing directly with the (supreme lodge). * * He made such a surrender to his association, paid the required fee, and the association made a record of it while he was yet alive. In doing this he did all that the laws of the order required to be done on his part in order to have a new certificate, changing the beneficiary. His right to make the change was absolute. There is nothing in the constitution and laws of the order which indicates that, he being a member in good standing, and the person whom he desired to be named as beneficiary in the new certificate being a person having an insurable interest in his life, either his subordinate association or the national association had any negative upon his choice, or any right to refuse his request. What followed was therefore merely ministerial, and was not affected by his death. His power to make a change in the disposition of the fund being absolute, when he exercised this power as fully as he could exercise it under the laws of the organization, the contingent right of his wife to the fund in the event of his death attached, and the fact that the certificate was issued after his death is immaterial, since the certificate is not the right itself, but merely the evidence of the right. It is argued that the (subordinate lodge) was merely an agent of (the member) to transact this business for him with the national association. Why should we so hold? It was not an agency selected by him, nor had he any choice in the selection of the agent. It is as much in conformity with legal analogy to say that the (subordinate lodge) was the agent of the national association as that it was the agent of (the member). Why should we resort to refinements of this kind for the purpose of defeating a disposition of a fund, made

in the very article of death, by the person who alone had the right to dispose of it, which disposition, though not a will, was testamentary in its nature?"¹

In *Knights of Honor v. Nairn*,² it is said: The form of surrender printed on the back (of the certificate) conforms precisely to the clause also inserted in the constitution, requiring every surrender and new direction to be signed by the member, and attested by the reporter under the lodge seal, he being the officer into whose hands it must be placed for transmission to the home office for reissue. Under this arrangement, the purpose is evident that the corporation shall always be in written contract relations with a member who is alive and in good standing, which will show them the identity of the beneficiary to whom they are liable. It is possible, and we need not consider under what circumstances, that when a member has executed and delivered to the reporter his attested surrender, in favor of a competent beneficiary, his death before a new certificate is rendered, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident. But in the present case the facts show conclusively that (the member) did not mean to have any surrender made until after his death."

An unmarried man took out a policy of insurance on his life, one of the conditions of which was: "This policy is issued and accepted upon the express condition that the assured may, with the consent of the company, at any time, assign it, or before assignment, change the beneficiaries therein, or make any other change." He named his sister as his beneficiary, and delivered the policy to her. Subsequently he married, and, as an inducement thereto, he agreed that if the woman would marry him, she should be made the beneficiary of the policy. After the marriage, and when the next semi-annual premium fell due, the assured paid it, on condition that the beneficiary should be changed from his sister to his wife. The sister had the policy, and would not give it up.³ The agent was uncertain whether the change could be made without the pol-

¹ *National American Association v. 78; Schmidt v. Association*, 82 Iowa Kirgin, 28 Mo. App. 80; *Fisk v. Equi-* 304.

table Aid Union, 116 Pa. St. (not reported); 11 Atl. Rep. 84; *Hirschl v.* ² 60 Mich. 44.

Clark, 81 Iowa 200; 47 N. W. Rep.

³ See § 226.

icy, but promised to notify the company and have the change made if possible. The officers agreed to attend to the matter, but overlooked it. After the death of the assured, the company filed a bill to require the wife and sister to interplead, and have the question determined, as to who was entitled to the money. It was decided, upon these facts, that whether such change was to be effected by parol or in writing was a matter entirely between the assured and the company; and if the latter chose to dispense with any of the modes of effecting this purpose, this concerned no third party, nor could the company capriciously refuse the change. The marriage having been consummated on the inducement of the promised change of the beneficiary under the policy, equity considers that done which ought to be done, and will give relief accordingly.¹

A member procured a certificate of insurance, making his betrothed his beneficiary. He retained the certificate in his possession, but afterward lost it. She married another man, and, within two years thereafter, he made a statement in writing of the loss of the certificate, and applied to the society for a reissue of the certificate, making his son the beneficiary. The society denied the application, on the ground that the certificate was not surrendered, although lost, and that the rules of the society required the change to be indorsed on the original certificate, to be attested by the recorder of the subordinate lodge, with the seal of the lodge affixed. By the advice of the officers of the subordinate lodge through whom he made the application, he attempted to make the change of beneficiary by giving a power of attorney to another to collect the amount which should accrue under the certificate. After his death, the society conceded its liability upon the certificate, and the court was asked, in equity and good conscience, to determine whether the original beneficiary or the son of the deceased was entitled to the fund. Upon these facts the court said: "He * did all that he could, and all that he was required in equity to do, to change the donee in the certificate named to that of his son. The rules of the order allowed him to do this, and it was not in the discretion of the order to prevent it. It was a right, under the rules of the order, of which he could not be deprived upon his complying with the condi-

¹ Nally v. Nally, 74 Ga. 669; see § 214.

tions prescribed for such action, and which he performed so far as it was in his power to perform, and for these reasons, it would be most unjust and inequitable for a court to disregard such action, and such intention of the deceased, before he died. * * All contracts are presumably made in view of the law governing their construction, and the rules of evidence applicable when the contract is sought to be established and applied. The law never requires impossibilities, and the rules of the order which require the certificate to be surrendered when a change of the beneficiary was made that it might be indorsed upon the certificate, could only be construed as requiring that to be done when the certificate was in existence. The existence of the right to share in the benefits of the order, and to direct who should receive the fund in case of the death of the member, was a right vested in the member as soon as he became entitled thereto, and the certificate was only evidence of the existence of that right, and where that evidence was lost the right remained, and its existence could be established by any other competent evidence, and the same is true of the existence of the change directed by the member of the beneficiary. (The member) did all he could in making the change, and it should have been allowed and done by the order."¹

The only mode for changing the beneficiary of the contract of insurance was by directing such change in writing on the back of the certificate, in a prescribed form attested by an officer of the society. A member, immediately before his death, desiring to change the beneficiary of his certificate which had been lost or mislaid without his fault, after unavailing search

¹ Grand Lodge v. Child, 70 Mich. 163; 38 N. W. Rep. 1; 14 West. Rep. 454; see Supreme Conclave v. Cappella, 41 Fed. Rep. 1; Marsh v. Supreme Council, 149 Mass. 512; 21 N. East. Rep. 1070; Isgrigg v. Schooley, 125 Ind. 94; 25 N. East. Rep. 151; Grand Lodge v. Noll, 90 Mich. 37; 51 N. W. Rep. 268; Rollins v. McHatton, 16 Colo. 203.

ter's right attaches when the surrender of the old one is accepted, and the new one is made out, and no delivery is necessary to enable it to be enforced against the company.

When a policy is given up to have another substituted to run in the name of a new beneficiary, the lat-

Bliss on Life Insurance, 202, 206, 214, 496, 497, 512, 574; May on Insurance, 61; Fried v. Ins. Co., 50 N. Y. 243; Cooper v. Ins. Co., 7 Nev. 116; Kentucky Mutual v. Jenks, 5 Ind. 96; Crittenden v. Ins. Co., 41 Mich. 442; Schmidt v. Association, 82 Iowa 304; 47 N. W. Rep. 1032.

for it, executed a will whereby he bequeathed the fund to the person whom he intended to substitute. On a bill of interpleader by the society it was held that a court of equity should recognize the disposition by will as a valid designation of a new beneficiary.¹ The decision was placed on the ground that as the certificate had been lost or mislaid without the fault of the member, it was impossible for him to name a new beneficiary in the prescribed manner, but that a court of equity could and should recognize the disposition by will.

A member held a certificate payable to his widow. The by-laws of the society provided that a member desiring to change his beneficiary might surrender his certificate to his lodge to be forwarded under its seal to the supreme reporter, who should cancel the old certificate and issue a new one to such member, payable as directed by him; and they further required that the member should place his signature upon the new certificate, accepting it upon the conditions named therein. On March 8, 1887, the member signed on the back of his original certificate a surrender thereof, directed that a new one be issued, payable to his sister, and sent it to the reporter of his lodge, who placed the seal of the lodge upon it and mailed it to the supreme reporter on March 10. A new certificate was issued to the sister on March 12. The member had died on March 10. It was held that the substitution of the sister had practically been completed before the death of the member, and that, as a member might accept a new certificate without formally writing his name upon it, as required by the by-laws, the issuing and acceptance of the new certificate would relate back to the time of the surrendering of the old one.²

In a letter to the society a member inclosed his certificate and requested that a certain substitution of beneficiaries be made, but the society returned the certificate to him with directions to sign a formal revocation and appointment of bene-

¹ Grand Lodge v. Noll, 90 Mich. 37; N. East. Rep. 388; reversing 6 N. Y. 51 N. W. Rep. 268; citing Grand Supp. 51; see Schmidt v. Association, Lodge v. Child, 70 Mich. 163; 38 N. *supra*; Hirschl v. Clark, 81 Iowa W. Rep. 1. 200; 47 N. Y. Rep. 78.

² Luhrs v. Luhrs, 123 N. Y. 367; 25

CHAPTER XV.

CHANGE OF BENEFICIARY.

- § 224. Consent of society to the change.
- 225. When society is estopped to question the change.
- 226. A beneficiary may be estopped to assert that a change was not properly made.
- 227. Delivery or gift of certificate to the beneficiary; effect on the right to change beneficiaries.
- 228. Effect of an agreement between two members that each shall procure a certificate for the benefit of the survivor.
- 229. A delivery of the certificate to the beneficiary is not necessary.
- 230. Who may be designated as a new beneficiary.
- 231. Does an inoperative change of beneficiaries revoke the original designation?
- 232. Incomplete designation; failure to exercise the power of appointment.
- 233. Change of beneficiary by suspended member in application for reinstatement.
- 234. Right of a member to change his beneficiary when the certificate is payable to his legal representatives.
- 234a. Fraudulent change of beneficiary.

§ 224. **Consent of the society to the change.**—The rules governing the consent of the society to the change of a beneficiary are the same as those governing its consent to an assignment of the contract of insurance, and they need not be discussed here in detail.¹ Where the by-laws of a society provide that no act of the member, done for the purpose of changing his beneficiary, shall entitle the beneficiary to any benefit, until such act has been ratified and approved by the society, the refusal of the society, based upon reasonable grounds, to approve a change, will bar a recovery by the new beneficiary.² The charter of a society gave a member the

¹ See § 169.

Hotel Men v. Brown, 33 Fed. Rep. 11;

² *Supreme Council v. Smith*, 45 N. Daniels v. Pratt, 143 Mass. 216; *Hel-*
J. Eq. 466; 17 Atl. Rep. 770; *National lenberg v. I. O. O. B.*, 94 N. Y. 583;
Mutual v. Lupold, 101 Pa. St. 111; *Jinks v. Banner Lodge*, 139 Pa. St.
Marcus v. Ins. Co., 68 N. Y. 625; 414; 21 Atl. Rep. 4.

right, with its consent, to make a change in his beneficiary. A by-law provided: "No change of beneficiary shall be effectual unless the certificate thereof shall have been filed, examined and found correct, and the necessary change made in the record of the association before the receipt of notice of the death of such member." In certain litigation upon a certificate of membership issued by it, the question was as to whether the consent of the society had been given to a change of beneficiaries. It was held that a declaration of the secretary that "the association has to inform you that it duly received a certificate made by C— S—, substituting your name as the beneficiary of his certificate of membership in this association, said certificate is numbered 244," was evidence against the society sufficient to support a finding that the certificate of substitution had been duly filed, examined, found correct, and the necessary change made in the records, there being no evidence that these things were not done by the society.¹

§ 225. **When the society is estopped to insist upon a defect or irregularity in a designation, disposition or substitution.**—The question as to the validity of a change made in the designation of a beneficiary has been discussed with reference to the rights of the person first designated. Another state of facts may arise, and the conflict of interest may be between the person in whose favor the designation was changed, and the society itself. Where the benefit fund will lapse to the society on failure of the member to designate a beneficiary to receive it, the officers of the society, by recognizing and acquiescing in a change of the beneficiary which is not in conformity with the rules and provisions of the contract, may estop it from claiming the benefit fund on account of the invalidity of the change. A member of a mutual benefit society received a certificate payable to his wife, whom he had married many years before. At the time of the marriage she had a daughter who afterward lived with them, but they had no children. After the death of the wife, which occurred a few months after the issuing of the certificate, the member made a will, by which he left to his step-daughter all his property. His property consisted of his clothes, a little furniture and the insurance in question. After the will was drawn he caused a friend to write a letter on the back of it to

¹ Mayer v. Equitable Association, 17 N. Y. St. Rep. 525; 49 Hun 336.

one of the principal officers of the lodge, and delivered the will to this officer. He also told the reporter of the lodge of the contents of the will, and of his understanding that it conveyed his insurance to his step-daughter. After the death of the member, the society refused to pay the step-daughter, who had proved the will, upon the ground that the member had not complied with the requirements of an article of its constitution providing that, "in the event of the death of all the beneficiaries designated by the member, before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member, and if no person shall be entitled to receive such benefit by the laws of the order, it shall revert to the widow and orphan benefit fund." So far as appeared the member had no relations, and the society claimed that the death benefit lapsed to the "widow and orphan benefit fund." Upon these facts the court said: "The delivery of the will to Osborn, the proper officer of the lodge, and the contemporaneous statements made by the assured to Boyer, the reporter of the lodge, and the retention of the will by said lodge without any objection to the form or manner of designation, constitute a waiver of any defect or irregularity in such designation or disposition. If the paper was regarded as imperfect, it was the duty of the officers of the lodge to return it to the assured with notice of the defect."¹

§ 226. **A beneficiary may be estopped to assert that the change was not perfected or properly made.**—No maxim of the law is better established or founded upon more substantial justice than that which declares that no one shall take advantage of his own wrong, and where a member has not been able, through the misconduct of the original beneficiary, to perform all the requirements of the contract, but has done all that he could do to designate another person to take the fund, the original beneficiary will not be heard to insist that the change was not perfected or properly made.² Where a beneficiary obtained possession of a certificate under the agreement that she would send it to the society to have it made payable to her and another, and afterward refused to sur-

¹ *Kepler v. Supreme Lodge, K. of* ² § 223.
H., 45 Hun (N. Y.) 274.

render it, it was held that she could not be heard to insist that a change subsequently made according to the agreement was invalid because the certificate had not been surrendered for cancellation according to the terms of the contract.¹ Where a member makes a change of beneficiaries by will, and that method is not a compliance with the contract, but the original beneficiary induces the member to rely upon her consent to and acquiescence in its provisions, and accepts benefits under it after his death, she is estopped to assert that the change is ineffectual.² By the laws of the corporation, a petition for substitution was required to have the seal of the member's subordinate council, and to be attested by the subordinate secretary. A member delivered his certificate and a petition for substitution to the subordinate secretary, who, acting in collusion with the original beneficiary, the member's wife, delivered the certificate to her, and forwarded the petition without sealing or attesting it. The corporation notwithstanding these omissions, recognized the petition as valid, and stood ready to make the substitution if it had received the certificate. It was held that the wife would not be heard to object that there was no valid substitution.³

§ 227. **Delivery or gift of the certificate to the beneficiary; effect on the right to change beneficiaries.**—The delivery of the certificate to the beneficiary named therein has no effect whatever upon the right of the member to change the designation, as provided in the contract of insurance.⁴ The benefit certificate issued by a society to a member, was made payable in the event of her death, to her husband, subject to change at her pleasure, on presentation of the certificate together with a new application to the supreme secretary. Notwithstanding the fact that the certificate was delivered to the husband, and the assessments thereon were paid by him, his wife had the

¹ Supreme Conclave v. Cappella, 41 Fed. Rep. 1; Isgrigg v. Schooley, 125 Ind. 94; 25 N. East. Rep. 151.

² Hainer v. Legion of Honor, 78 Iowa 245; 43 N. W. Rep. 185; see § 237.

³ Marsh v. Supreme Council, 149 Mass. 512; 21 N. East. Rep. 1070.

⁴ Masonic Association v. Bunch, 109

Mo. 560; 19 S. W. Rep. 25; Brown v. Grand Lodge, 80 Iowa 287; 45 N. W. Rep. 884; Byrne v. Casey, 70 Texas 247; 8 S. W. Rep. 38; Splawn v. Chew, 60 Texas, 534; Manning v. Ancient Order, 86 Ky. 136; 5 S. W. Rep. 385; Society v. McVay, 92 Pa. St. 510; see Nally v. Nally, 74 Ga. 669.

right on presenting it to the supreme secretary to apply for and effect a change in the designation of the beneficiary named therein. When the husband accepted the certificate and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife to change the beneficiary to whom the insurance money should be paid upon her death.¹ A certificate upon the life of a son was made payable to his mother, and delivered to her. His father paid the assessments. Soon afterward he married, obtained possession of the certificate, and, without his mother's knowledge or consent, surrendered it, and took out another payable to his wife, and delivered it to her. In a few months and just before his death he surrendered the second certificate, procured a new one, payable as the original had been, to his mother, and delivered it into her possession. This was done without the knowledge or consent of his wife. The certificate and by-laws of the society gave the member the right to surrender this certificate and procure a new one at pleasure. It was held that, though the certificate was delivered as a gift to the wife, it was subject to the condition attached to the gift, that the assured might at any time surrender it, and name another beneficiary, and that the wife had no right to the fund upon her husband's death.²

A certificate was made payable to the wife of the member. On a division of property between the two when they were divorced it was given to her as her own property, and for two years or more she paid all dues and assessments thereon from her own earnings. The constitution of the society provided that a member might at any time while in good standing surrender his certificate and take a new one payable as he might direct, and that the beneficiary might be changed, as the member might thereafter direct, and that such change should be entered in the benefit certificate. He filed with the society an affidavit that his divorced wife refused to surrender the certificate and procured a new one payable to his adult children by a former wife. It appeared that the divorced wife had three small children by him who were dependent on her for support.

¹ *Fisk v. Equitable Aid Union* (Pa. Grand Lodge, 8 N. Y. Supp. 185; 6 St.), 11 Atl. Rep. 84. N. Y. St. Rep. 151; *Sabin v. Phinney*,

² *Appeal of Beatty*, 122 Pa. St. 428; 134 N. Y. 422; 31 N. E. Rep. 1087; see 15 Atl. Rep. 861; see also *Sabin v.* § 228.

The court held that the divorced wife was entitled, as against the adult children, to the fund, and placed its decision on the sole ground, that the object of the society was to raise a widows' and orphans' fund and that it would be a perversion of the fund to appropriate it to adult children, excluding the widow and infant children.¹ A certificate was payable to the wife of a member, "or to the beneficiary or beneficiaries that he may hereafter have a certificate made in favor of, on surrender of this certificate." When he obtained it the member handed it to his wife, and, during the next three or four years, frequently remarked that he had given her the insurance; that he wanted to keep it up for her benefit, and that he thought it was all he would leave her. It was kept in her bureau drawer, and was taken by the member, four years after its issue and surrendered to the society for a new one payable to other beneficiaries. After his death it was contended that having given and delivered the certificate to his wife, he could not repossess himself of it without her consent. The court said: "Assuming the certificate to be the subject of a valid gift from a husband to his wife, which we need not decide, the question remains whether a gift was in fact made. Such a gift should be evidenced by convincing, if not unmistakable proof, and of this we are not satisfied. The remarks of the husband that he had given the insurance to his wife were true when they were made, in the sense that she was then the designated beneficiary; and they do not necessarily import more than this. After he had made the change he did not so state. * * Neither is the possession of the certificate conclusive. Possession by the wife is presumed to be possession by the husband

¹Leaf v. Leaf, 92 Ky. 166; 17 S. W. Rep. 354. The charter of the society provided that the fund should "be paid to his (the member's) family, or as he may direct." In the statement of the facts in the case it does not appear who paid the assessments after the new certificate was issued. The court in the opinion lays great stress upon the fact that the divorced wife paid several assessments, but we have seen that she was bound to know that he might at any time change the beneficiary. In placing its decision on the objects of the society, the court does violence to the very words of the charter. The case of Manning v. Ancient Order, 86 Ky. 136; 5 S. W. Rep. 385, cited by the court, is another one in which the law was badly strained in order to give the fund to the person whom the court thought ought to have it, no matter what the facts and the contract were.

where they live together, unless it appears to be a possession to the exclusion of the husband. (The husband) had access to the certificate, and took it without asking, thus showing by his conduct that he, at least, supposed he still had control of it. We do not think a gift is proved.”¹

A beneficiary who pays the assessments on a certificate voluntarily and gratuitously, and not under a contract with the assured, acquires no vested interest therein as against a person afterward named as beneficiary by the member.² A member may change this beneficiary, though the latter has paid the assessments and has possession of the certificate.³ But it has been held that where a person became a member of a society under an agreement with the beneficiary designated in his certificate that the beneficiary should pay all assessments, and he paid them under the agreement, the beneficiary acquired a vested interest in the certificate, and the member could not afterward make another designation.⁴ A provision of the charter or of a contract of the society, declaring that a member shall have a right to make a change of his beneficiary without the consent of the latter, applies when the original designation is in the nature of an inchoate or an unexecuted gift, and where there is no agreement on the part of the member, the society and the beneficiary that no change shall be made. It does not prevent an express contract between the member, the beneficiary and the society that a vested right shall pass to the beneficiary.⁵

§ 228. **Effect of an agreement between two members that each shall procure a certificate for the benefit of the survivor.**—When the contract of insurance provides that a member may at any time change the designation of his beneficiary and make a new direction for the payment of the benefit fund, a mutual agreement between two members that each shall procure a benefit certificate for the benefit of the survivor in case of death, does not take away from either member the power of appointment of a new beneficiary. Where a husband and

¹ Supreme Council v. Morrison, 16 R. I. 468; 17 Atl. Rep. 57; see Williams' Appeal, 106 Pa. St. 116.

⁴ Maynard v. Vanderwerker, 24 N. Y. Supp. 932.

⁵ Smith v. National Benefit Society,

² Nix v. Donovan, 18 N. Y. Supp. 435. 123 N. Y. 85.

³ Masonic Association v. Bunch, 109 Mo. 560.

wife become members of a society and agree that their respective certificates shall be continued operative for the benefit of the survivor, and the by-laws of the society provide that any member holding a certificate, desiring at any time to make a new direction as to its payment, may do so in a certain manner, the power of appointment of a new beneficiary still resides in each member by virtue of the contract with the society. While the exercise of this power by the husband, for instance, is in violation of his agreement with his wife, it is one of the elements of the agreement under which the certificate was issued. The contract of insurance is executory on the part of the society during the life of the member, and its liability to pay the fund after his death is upon the last direction as to its payment, made in conformity with the terms of the contract.¹

§ 229. **A delivery of the certificate to the beneficiary is not necessary.**—When a member of a society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named. The claim of the beneficiary in such a case is not based on a contract with him, but upon the appointment made by the member, or the direction given by him for the payment of the money. Where the benefit certificate of a member was made payable at his death to such person as he should direct on the face of the certificate, and the member on the face of the certificate directed that the benefit fund should be paid to a certain person, and retained possession of the certificate until his death, it was held that the beneficiary so designated took the fund by appointment, and that no delivery of the certificate in the lifetime of the member was necessary.²

§ 230. **Who may be designated as a new beneficiary.**—It is evident that where the classes of persons who may be made beneficiaries are limited by the charter of a society, no one may be designated as a new beneficiary who might not have been designated originally.³ Where the organic law of a society, the statute under which it is incorporated, is amended

¹ *Sabin v. Grand Lodge*, 26 N. Y. 366; 13 Ill. App. 510; see *Scott v. Weekly Dig.* 309; 6 N. Y. St. Rept'r Dickson, 108 Pa. St. 6. 151.

³ § 158.

² *Highland v. Highland*, 109 Ill.

by an act which does not require formal adoption by existing societies, and the powers of societies are thereby enlarged by adding to the persons who may become beneficiaries, a member may with the consent of the society make a new designation which can only be lawfully made by virtue of the later statute. In such a case it can not be said that the society was exercising, and was only authorized to exercise, the more limited powers which it had under the earlier statute.¹ When the constitution of a society, which originally provided that a benefit should be paid only to the widow or children of a deceased member, had been legally amended so as to permit the amount to be paid to any one designated by the member in his lifetime, the person so designated, and not the widow, was held to be entitled to the fund.² If the contract does not specify those who may be made the object of a member's bounty, he may designate any person as his beneficiary.³

§ 231. **Does an inoperative change of the beneficiary revoke the original designation?**—In one case it was held that where a member has in conformity with the law of the society designated the person to whom the fund shall at his death be paid, this original designation will remain in force, unless a valid and legal change is made in the designation of beneficiaries. An attempted change which is for any reason inoperative, invalid or illegal, does not operate as a revocation of the original designation.⁴ In one case the society was organized to assist "the widows, orphans, or other dependents of deceased members," and in certain events the fund was payable to their family or heirs. The language of the court was as follows: "(The member) in his application for membership, designated his wife as the person to whom the benefit was to be paid upon his death. At a later day he attempted to change the designation from his wife to his mother. It is agreed that his mother was not living with him, but was living with her husband in another town and county. It is not suggested that she was dependent upon him. She was not one of those

¹ Marsh v. Supreme Council, 149 Mass. 511; 21 N. East. Rep. 1070; Catholic Order of Foresters v. Callahan, 146 Mass. 393; 16 N. East. Rep. 14; see § 162.

² Durian v. Verein, 7 Daly 168.

³ See §§ 159 *et seq.*

⁴ Elsey v. Odd Fellows, 142 Mass. 224; 7 N. East. Rep. 844; Grace v. Association (Wis.), 58 N. W. Rep. 1041

who would be his heirs, and she was not one of the members of the decedent's family within the meaning of the by-law. To give the word 'family' the broad construction claimed by the respondent would make the by-law overreach the scope of the statute, and violate its spirit and purpose. It follows that the attempted designation to the mother of the deceased member was illegal and invalid, and we need not discuss the question whether it was sufficiently assented to by the directors of the defendant corporation. As the assignment to the mother was invalid, we think the original designation to the wife remained in force. We can see no reason to suppose that the later assignment was intended to operate as a revocation of the designation to the wife, unless it took effect as a designation to the mother. The scheme of the by-laws is that the beneficiary shall be designated by the member in his application for membership, and the benefit shall be paid to such beneficiary, unless there is a subsequent legal assignment. They make no provision for revoking a designation except by a legal assignment to some other person, assented to by the directors. We can not presume that the deceased member intended his assignment to operate as a revocation of the previous designation in the event of its invalidity as an assignment to his mother, and there is no assent of the directors to any such revocation."¹

In another case a member changed the beneficiaries of his certificate and made two hundred and fifty dollars of it payable to a Mrs. Lamprey, who was not a member of his family nor in any way related to or dependent upon him. At the time this change was made the constitution of the society authorized the issuing of a certificate to a member payable "to some member or members of his family, or person or persons dependent on him, as he may direct or designate by name." The society did not know, at the time of issuing the new certificate according to the direction of the member, that Mrs. Lamprey was neither a member of his family, nor dependent upon him. After his death the beneficiaries of the first certificate claimed that the change of beneficiaries was inoperative as to the two hundred and fifty dollars, made pay-

¹ See *Hicks v. Perry*, 140 Mass. 580; 5 Court, 46 N. J. Eq. 102; 18 Atl. Rep. N. East. Rep. 634; *Britton v. Supreme* 675; *Park v. Welch*, 33 Ill. App. 188.

able to Mrs. Lamprey, and they sought to have that sum divided among them. Upon this question the court said: "Whether Mrs. Lamprey is entitled to the benefit of \$250, payable to her by the last certificate, is a question in which the other defendants have no interest. In no event are they entitled to it. They can receive no more than the sums made payable to them respectively. If the direction by which the sum of \$250 was made payable to Mrs. Lamprey was invalid because she was neither a member of F. P. Watson's family nor dependent upon him, the benefit to that extent lapses, if the society so elects, for want of a valid exercise of the power of direction. But the question whether it was valid can be raised by no one but the society, and it does not raise it.¹ By paying the money into court it has expressed its willingness to have paid it to Mrs. Lamprey. * * As the society promised to pay her that sum, and does not object to paying it, and no other person has the right to object, nor any interest in the money, she is entitled to a decree that it be paid to her."² In the absence of a valid designation, or a valid change of beneficiaries, the proceeds of the contract will be disposed of as if no designation or change had been made.³

§ 232. **Incomplete designation; failure to exercise the power of appointment.**—The by-laws of a society provided that the members might designate the person or persons to whom payment of the benefit fund should be made after death, but made no provision as to the manner in which such designation should be made. On the back of its certificates, however, it placed a blank form in print, with the places

¹ Citing *Brown v. Mansur*, 64 N. H. 39; 5 Atl. Rep. 768.

² *Knights of Honor v. Watson*, 64 N. H. 517; 15 Atl. Rep. 125; 6 N. Eng. Rep. 888; see *Luhrs v. Supreme Lodge*, 7 N. Y. Supp. 487; *Burns v. Grand Lodge*, 153 Mass. 173; 26 N. East. Rep. 443. It will be observed that there is an essential difference between these cases and *Elsey v. Odd Fellows*, etc., *supra*. In the latter case the original certificate payable to the beneficiary named in it was outstanding, and it was held that if

the attempted assignment of it was void, it still stood in force. But in these cases, the original certificates had been surrendered and canceled, and new ones had been issued in their stead. The fact that the beneficiaries under the new contracts were not entitled to take under the laws of the society, did not revive the old contracts.

³ *Parke v. Welch*, 33 Ill. App. 188; *Burns v. Grand Lodge*, 153 Mass. 173; 26 N. East. Rep. 443; *Arthurs v. Baird*, 8 Pa. Co. Repts. 67.

designated for the signature of the member holding the certificate, and for the name of a witness. The court held that the placing of this printed form in blank upon the back of the certificate pointed out the manner in which such designation should be made, and that where the member had merely filled up the blank in the form for designation with the names of his three daughters, and had not signed such designation, nor had a witness sign it, the designation was incomplete and invalid.¹ An association, organized for "furnishing relief and assistance by means of mutual agreement and payment of funds," and "to secure to dependent and loved ones assistance and relief at the death of a member," issued to a member a certificate providing "that a sum not exceeding \$2,000 will be paid by the association as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies." The member died in good standing without designating a beneficiary as provided, or in any other manner. Upon these facts, the court held that the fund lapsed to the society, and said: "The defendant promised to pay the benefit to no one save such person or persons as (the deceased member) should direct by entry upon the certificate or record book of the association. By the contract he had the mere power of appointing the person who should receive the benefit. He was bound by the rules of the association, and could not change the beneficiary in a way not in conformity with them. * * He had no personal interest in his membership, and his personal representative, as such, can take no interest in it after his death."² A certificate of membership in a mutual benefit society may be reformed, after the death of the member, by inserting the name of a beneficiary, when it appears that the secretary of the association and the assured both understood at the time of the application, that the proposed name should be entered upon the record without further direction, and

¹ Elliott v. Whedber, 94 N. C. 115; ² Eastman v. Provident Mutual Relief Ass'n, 62 N. H. 555; 20 C. L. Supp. 232; Hellenberg v. I. O. O. B., Jour. 266; see Worley v. N. W. Masonic Aid, 10 Fed. Rep. 227

where it was the duty of the secretary to enter and keep a record of the names of the beneficiaries.¹ And a certificate providing for the payment of the benefit to such person as the member "may, by entry on the record-book of the association, or on the face of this certificate, direct the same to be paid," will be reformed in equity, to conform to the intention of the parties where the making of the entry is omitted, owing to the fact that both parties believed it would be payable to the member's administrator on his death, although this is a mistake of law and not of fact.²

§ 233. **Change of beneficiary by suspended member on application for reinstatement.**—In *Davidson v. Supreme Lodge*,³ it was held that, under the provisions of the constitution of the endowment rank, a member of the endowment rank of the Knights of Pythias, who becomes suspended by reason of the suspension of the section to which he belongs, may in his application for reinstatement designate a new beneficiary, and the lodge in re-admitting him, acquiesces in the change, notwithstanding he receives and countersigns a "clearance card" referring to him as the holder of his old certificate which, by its terms, had become null and void by reason of the suspension of his section. In this case the contract provided that any member desiring to change his beneficiary might make a written request for that purpose to his section, and if it were approved it should be certified by the section to the supreme master of the exchequer, who should issue a new certificate in accordance with it. The decision is placed upon the ground that, as the section to which the member had belonged was not in existence because of its suspension, the provisions for making the change did not apply, and, as the member was for the same reason out of the order, he was re-admitted on the same footing as any new member, and had the right to name a new beneficiary in his application for membership.

§ 234. **Right of a member to change his beneficiary**

¹ *Scott v. Provident Mutual*, 63 N. v. *Courser*, 64 N. H. 506; 15 Atl. Rep. H. 556; 4 Atl. Rep. 792; 2 N. Eng. 129; *Stedwell v. Anderson*, 21 Conn. Rep. 286; see *Globe Ins. Co. v. Boyle*, 139; *Bank v. Ins. Co.*, 31 Conn. 517, 21 Ohio St. 119; see § 152. 529.

² *Eastman v. Provident Mutual*, 62 N. H. 555; 13 Atl. Rep. 745; *McCone* ³ 22 Mo. App. 263.

when the certificate is payable to his legal representatives.—Where a certificate of membership is made payable to the “legal representatives” of the member, or to his “executors and administrators,” as may be done under the charters of some societies, he may, with the consent of the society surrender the same and take out a new certificate payable to a third person.¹

§ 234a. **Fraudulent change of beneficiary.**—One who has an insurable interest in the life of the member has a right to use all the persuasive arts at his command to induce the member to make him the beneficiary of his certificate.² When the beneficiary has no vested right in the benefit fund, a change of beneficiary works no fraud upon him or those claiming through or under him. A member of a mutual benefit society, knowing that the beneficiary named in his certificate is greatly indebted, may in accordance with the laws and regulations of the society change the beneficiary entirely, or make the fund payable to a person in trust for the original beneficiary, and such change will constitute no fraud upon the original beneficiary or his creditors.³ Where the member has a right to change his beneficiary, the original beneficiary will not be heard to assert that the member procured the certificate from him by fraud and then designated another in his place. Having no vested right in the contract, he has no legal ground of complaint for such a fraud.⁴

¹ Johnson v. Van Epps, 110 Ill. 551; ³ Schillinger v. Boes, 85 Ky. 357; 3
Petty v. Wilson, 4 L. R. Ch. Ap- S. W. Rep. 427.

peals, 574; Harding v. Littlehale, 150 ⁴ Brown v. Grand Lodge, 80 Iowa
Mass. 100. 287.

² Pingree v. Jones, 80 Ill. 181.

CHAPTER XVI.

DESIGNATION AND CHANGE OF BENEFICIARY.

- § 235. Designation by last will; where the right to devise the fund is conveyed by charter.
- 236. Designation of a new beneficiary or disposition of the fund by last will.
- 237. When a designation or disposition by will is invalid.
- 238, 239. When a disposition by will is invalid; power of appointment reserved to the member.
- 240. Where the designation of a beneficiary is the execution of a power of appointment, it must be made according to the laws of the society.
- 241. Designation by special appointment.
- 242. A designation is not necessarily revoked by the subsequent marriage of the member.
- 243. When the power to designate or change the beneficiary is exhausted.
- 244. Time within which the power of appointment or the right to designate a new beneficiary may be exercised.

§ 235. **Designation by last will; where the right to devise the fund is conferred by the charter.**—A society organized under an act providing for the payment of benefits to devisees or legatees of deceased members, can not by provisions of its by-laws or certificates of membership, restrict or limit the right of a member to devise the fund or to appoint, designate or change his beneficiary by his will. A by-law or certificate of such a society, prescribing another mode of appointing, designating or changing a beneficiary, is subject to the right of the member to accomplish this object by his last will and testament. Thus in *Raub v. Association*,¹ an association was organized under an act of congress, and a section of its charter provided that “the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphans, heirs, assignees or legatees of a deceased member, immediately upon

¹ 3 Mackey (D. C.) 68.

proof of such death." Another section of the charter authorized the directors to make by-laws, "not contrary to this charter, or to the laws of the United States." One by-law provided: "No change of beneficiary can be made or recognized until submitted to and approved by the board of directors." A member named his sister as his beneficiary with the consent and approval of the board of directors. Afterward he made a will directing the fund to be paid at his death to his illegitimate son. The board of directors had no knowledge of this change, and, on the death of the member, the sister claimed the fund. The supreme court of the District of Columbia said: "The validity of this new designation is presented as a question for the determination of the court. * * The power of the association to make by-laws was limited by the charter itself to such by-laws as should not be in violation of the laws and constitution of the United States. And this would have been the case even had it not been provided for in the charter. Now, one of the laws of the United States is this very charter, the second section of which provides that "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphans, heirs, assignees or legatees of a deceased member, immediately upon proof of such decease." That provision recognizes fully and completely the right of a member of the association to designate the beneficiary by his will, and that power can not be cut off or diminished by a by-law. So far, then, as this by-law attempts to do so, it is itself inoperative. * * We must, therefore, give effect to the recognition contained in that statute of the power to make a bequest, and we can not cut it down by any construction that we might give to this by-law."¹

§ 236. **Designation of a new beneficiary or disposition of the fund by last will.**—The mode of designating or changing the beneficiary by last will and testament has given rise to much controversy. Where the benefit fund is payable at the death of the member to his estate, and where there is nothing in the act under which a corporation is organized, or in the charter, constitution, by-laws, or certificate of membership, which takes away from him the right and power to dispose of

¹ See § 178.

the benefit fund by last will and testament in the ordinary manner, such a right certainly exists. We have seen in the preceding chapters that in very few societies is the estate of the member a proper beneficiary, and that, in most cases, the member has no property in the benefit fund. When he has, however, an interest in the fund, which may, at his death, become assets of his estate, he may dispose of the fund by will precisely as he may bequeath other property, unless he is prohibited from doing so by the contract of insurance. The right to make such a disposition of his property is given to a member by the laws of the land, and where it is claimed that the right to dispose of such a fund has been abridged, or entirely taken away by the terms of the contract of insurance, the burden of proving such an abridgment or abrogation is upon the person making such a claim. Very clear and binding provisions must be entered into by contract to deprive a member of such a right.¹ If the member has such an interest in the fund, and there is no provision in the charter, by-laws or certificate of membership abridging or abrogating, either in express terms or by necessary implication, his right to dispose of the fund by will, the member may so dispose of it, either by specific or general devise; and, where it has not been specifically bequeathed in the will, it will pass under a general residuary clause; and a will bequeathing all the estate of the testator, in general terms, will pass the fund. A benefit certificate payable to the member, is subject to bequest by him.²

A member had issued to him a certificate stating that he

¹ *Catholic Ben. Association v. Priest*, 46 Mich. 429; *Stoelker v. Thornton*, 88 Ala. 241; 6 So. Rep. 680; *Hannigan v. Ingraham*, 8 N. Y. Supp. 232; *Hamilton v. McQuillan*, 82 Me. 204; 19 Atl. Rep. 166; *Harding v. Littlehale*, 150 Mass. 100.

² *Catholic Knights v. Kuhn*, 91 Tenn. 214; 18 S. W. Rep. 385. In *Hannigan v. Ingraham*, 8 N. Y. Supp. 232, the by-laws of the society declared that "its object was to aid and benefit the families of deceased members of the brotherhood, in a simple and substantial manner." No particular mode or manner of designating a beneficiary was prescribed, but there was printed on the certificate the following words: "All payments or benefits that may accrue or become due to the heirs of the person insured, by virtue of this policy, will be payable to——, or lawful heirs." These words were not signed by the member, nor was the blank space filled out. He made a will designating the persons who should receive the fund, and the court held the designation valid.

was "entitled to participate in the guarantee fund, to the extent of \$1 for each member of said association in good standing at his death," not to exceed \$1,000; "said sum of \$1,000, or less, at his death, to be paid to ———, subject to his will." He never filled the blank in the certificate, ^{by} inserting the name of a beneficiary, but in his application, ^{he} stated: "I hereby authorize and direct that the amount of said guarantee fund, to which I may be entitled shall, at my death, be paid subject to my will." He died leaving a last will whereby he gave, devised and bequeathed to his mother, after payment of all his debts and liabilities, all his estate and effects. The court held that, under the facts of the case and the peculiar terms of the contract, the fund formed a part of the assets of the estate and passed to his mother under the general terms of the will.¹ A testator gave to his wife "any money which he might die possessed of, or which might be due and owing to him at the time of his decease." Money payable under a policy of insurance on his life, in six months after his death, to his legal representatives, passed under this bequest.² Where a power to change the beneficiary by the appointment of a new one is reserved to the member in the contract of insurance, and no mode of executing this power is provided, it may be executed by will.³ Where, under the contract of insurance, the member may change his beneficiary, and there is no provision

¹Winterhalter v. Workmen's Association, 75 Cal. 245; 17 Pac. Rep. 1. It is to be noted also in this case that the society admitted its liability on the contract, and caused the mother and the executor to interplead to determine whether the fund should be paid directly to the mother or to the executor for due course of administration and distribution.

²Petty v. Wilson, 4 L. R. Ch. App. 574. A testator had insured the life of his wife for his own benefit, with a provision that if he died before her the insurance money should be paid to their children. He died before her, leaving no children, and by his will gave her "all the residue of his estate, both real and personal, in what-

ever it (might) consist or wherever situated, to be hers without restraint and absolutely." Upon the death of the wife the insurance money became payable to his executor as assets of his estate. The testator's interest in the policy passed to the wife in her lifetime by the residuary clause of the will, and after her death to her representatives. Had the testator died intestate the policy would have passed to the administrator as assets; and as a general rule whatever would thus pass may be devised. Keller v. Gaylor, 40 Conn. 343; 3 Ins. Law Jour. 303.

³Masonic Association v. Bunch, 109 Mo. 560.

of the charter, by-laws or certificate of membership, governing the manner and mode in which such change shall be made, a designation of a new beneficiary may be made by his last will and testament.¹ A will making a disposition of a benefit fund, the disposition being valid in other respects, is in no wise affected by the fact that it carries out the result attempted to be carried out before its execution by illegal contracts for the sale of the certificate.²

§ 237. **When a disposition or designation by will is invalid.**—Where, by a provision of the charter, the fund is payable to certain classes of beneficiaries, not including devisees, and the member can have no interest in the benefit resulting from his membership; where it is not payable to him in any event, and can not become a part of his estate, there is no interest or right of property in the contract of insurance, which will pass by his will.³ When, in the charter, by-laws or certificates of membership other ways of changing beneficiaries are named, and no provision is made for changing them by will, the latter mode will be ineffectual, as against the rights of the beneficiary named in the certificate.⁴ Where the contract provides that each member shall designate in writing some person as nominee for the benefit fund, and that, upon the death of a member, the nominee so designated by him shall receive such fund, a designation of the beneficiary during the lifetime of the member is contemplated, and may not be made by will.⁵ Where the contract of insurance provides that the designation of the beneficiary shall be made during the lifetime of the member and be approved by the directors, a designation by will is not valid. A designation which may be changed by a member at pleasure and approved or disapproved by the directors after his death, is not within the

¹ *Kaiser v. Kaiser*, 24 N. Y. Weekly N. W. Rep. 217; *Bown v. Catholic Dig.* 410; 13 Daly, 522; *Supreme Council v. Priest*, 46 Mich. 429; see § 214. *Swift v. San Francisco Board*, 67 Cal.

² *Stoelker v. Thornton*, 88 Ala. 241; 567; *Dennett v. Kirk*, 59 N. H. 10. 6 So. Rep. 680.

⁴ See §§ 218, 219, 220.

³ *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93; 14 Pac. Rep. 449; *Renk v. Herman Lodge, etc.*, 2 Demarest (N. Y.) 409; *Cath. Ben. Association v. Priest*, 46 Mich. 429; *McClure v. Johnson*, 56 Iowa 620; 10

⁵ *Order of Mutual Companions v. Griest*, 76 Cal. 494; 18 Pac. Rep. 652; see also *Hotel Men's Mutual v. Brown*, 33 Fed. Rep. 11; *Supreme Lodge v. Stephenson*, 64 Iowa 534.

meaning of the by-laws.¹ Where the designation must, under the contract of insurance, be reported to the society for registration on its books, prior to the decease of the member, the last will and testament will operate as a sufficient designation if it be brought to the notice of the society during the lifetime of the member. In such a case it will be good as a designation, although not yet operative as a will.² But where, in such a case, it is not brought to the notice of the society until after the member's death, it is ineffectual as a designation.

A society agreed upon the death of a member to pay \$1,000 to his wife, if living, if dead, to his children; and if there should be neither wife nor children, then to such person or persons as he may have formally designated to his lodge prior to his decease. He died without either wife or children, and did not in any manner designate to his lodge prior to his decease the person or persons to whom he desired payment to be made. He, however, left a will giving the money to be derived from the insurance to his brother. By the express terms of the contract, the society was not to be liable to pay until such formal designation was made by him to his lodge prior to his decease, and, as none such was made, no liability existed.³ A by-law provided: "A member may at any time when in good standing surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct." In construing this, the court said: "The contract clearly contemplated that the change should be made and perfected by the assured during his lifetime."⁴ Where a member makes a change of beneficiaries by will, and that method is not in compliance with the contract, but the original beneficiary induces the member to rely upon her consent to, and acquiescence in the provisions of such will, and accepts

¹ Daniels v. Pratt, 143 Mass. 216; ³ Hellenberg v. I. O. O. B., *supra*; 10 N. East. Rep. 166; Supreme Council v. Perry, 140 Mass. 580; 5 N. East. 557; § 238.

Rep. 634.

² Kepler v. Supreme Lodge K. of H., 45 Hun (N. Y.) 274; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. N. East. Rep. 866; Scott v. Scott, 20 Ontario 313.

⁴ Holland v. Taylor, 111 Ind. 121; 12 N. East. Rep. 116; see McCarthy v. Supreme Lodge, 153 Mass. 314; 26

benefits under it after his decease, she is estopped from afterward asserting that the change was ineffectual, and from claiming the fund under the certificate.¹

§ 238. **When a disposition by will is invalid, power of appointment reserved to the member.**—Where the charter, by-laws or certificates of membership give to the member the mere power of appointing a beneficiary by will, the power of appointment must be exercised as such, and the fund will not pass as a part of the member's estate under a residuary clause of his will, or under a will merely disposing of all the estate of the testator. The intention to execute a power of appointment by will must appear by a reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power.² When the will of a deceased member affords no evidence of a design to execute the power by either of the modes laid down in this rule; when it neither refers to the power, nor to the sum of money which is the subject of it, nor is inoperative for want of property to give it effect as a testamentary act, it will not pass the title to the fund.³ An insured had four policies on his life, in one of which (the *Globe*) he reserved a power to appoint a new beneficiary. His last will contained the following clause: "My life being assured as follows:" (setting out the policies) "I wish to divide among my three children as follows:" (setting out names and amounts.) No act of the insured, except that provision of the will, was set up as an attempt to execute the reserved power of substitution of a new beneficiary under the policy above referred to. The court said: "But I do not construe the will as an execution of the power. The tes-

¹ *Hainer v. Iowa Legion of Honor*, v. *Curry*, 1 *Swanst.* 66; *Standen v. 78 Iowa* 245; 43 *N. W. Rep.* 185. It *Standen*, 2 *Ves. Jr.* 589; *Webb v.* is a principle that no one shall be *Honnor*, 1 *Jac. & Walk.* 352; *Sugden* permitted to claim under, and adverse on *Powers*, 301-303; 1 *Story's C. C.* to, a will. *White v. Brocaw*, 14 *Oh. Rep.* 427; 4 *Kent Com.* 327 *et seq.* *St.* 339; *Havens v. Sackett*, 15 *N. Y.* ³ *Duvall v. Goodson*, 79 *Ky.* 224; 365; *Ditch v. Sennott*, 117 *Ill.* 362; 7 *Hellenberg v. Dist. No. 1*, 94 *N. Y. N. East. Rep.* 636; 1 *Jarm. Wills*, 580; *Md. Mut. Ben. Soc. v. Clendenin*, 44 *Md.* 429; *Arthur v. Odd* 286; *Bigelow Estop.* 642; see § 226.

² *Burleigh v. Clough*, 52 *N. H.* 267; *Fellows*, 29 *Ohio St.* 559; *Greeno v. 280; Johnson v. Stanton*, 30 *Conn. Greeno*, 23 *Hun* 478; *St. John's Mite* 297; *Blaggs v. Miles*, 1 *Story* 426; *Ass'n v. Buchly*, 5 *Mackey (D. C.) Lovell v. Knight*, 3 *Sim.* 275; *Jones* 406.

tator treated as his own property four policies of life insurance, all of which belonged to the children of his wife. * * None of these were subject to his bequest, yet he attempted to bequeath them all. No reference is made to the power of appointment reserved in the Globe policy. It is true that the policy is referred to by name; and, under some of the authorities a plain and unambiguous reference to the subject of the power has been held sufficient to treat the devise or bequest of the property as an execution of a power of appointment. But in all cases to which the attention of the court has been called, the intention of the testator has been the objective point of inquiry and construction. It is impossible to impute to this testator an intention to execute this power. His intention, on the contrary, clearly was to bequeath this particular policy with others as a part of his personal estate. This controlling intent is inconsistent with any idea of an execution of the power."¹

A by-law of a society provided that the benefit fund stipulated for in a member's certificate "may be disposed of by his last will and testament, otherwise it shall belong to and be paid to his widow, or in case he leaves no widow, then to the heirs and legal representatives of the deceased, and, in the absence of such will, and in case such member leave no widow, heirs or representatives, such premium shall revert to the company." The court held that the power reserved to the testator under this by-law to dispose of the amount payable at his death was in the nature of a power of appointment, and that the fund would pass only in pursuance of a clause expressing in clear and unmistakable terms the intention of the testator to divert it from the purposes to which by the by-laws of the association it was to be devoted, and would not pass as a part of his estate under the residuary clause of his will.²

The charter of a society provided as follows: "The fund created in section 9 for the benefit of the widow and children of the deceased member shall be paid to them by said company as soon as it can be collected, or to their trustee, in the discre-

¹Eiseman v. Judah (U. S. C. C. is difficult, if not impossible, to understand. West Dist. of Tenn.), 4 Cent. L. Jour. stand.

345. But see Supreme Council v. ²Greeno v. Greeno, 23 Hun 478. Firnane, 50 Mich. 82, a case which it

tion of the company, subject, however, to be appropriated for their benefit equally, according to the will of the deceased member; or if he should leave no widow or child, then to be appropriated according to his will, or if he makes no will, and leaves no widow or child, it shall vest, and remain in the company, and be added to its capital stock, or be appropriated as it may deem expedient." An insured member died leaving no widow and no child, and it was claimed that the contingency therefore existed, in which under the charter he had power to dispose of the proceeds of his membership by will, and that he had so disposed of the proceeds by the clause of his will disposing of his residuary estate. But the court held that the charter gave the member a mere power of appointment, in case he had neither wife nor child, that the assured had no interest whatever in the fund, and that, therefore, the fund did not pass under a will merely disposing of all his estate, but in which no mention was made of the fund to arise from his membership.¹

A testator made this provision in his will: "After the payment of all my just debts and funeral expenses by my executor out of my estate, I devise as follows: I give and bequeath the entire residue of my estate to my three sisters, E. C. A., M. F. S. and G. R., and my esteemed friend M. V. L., each of them to have and receive a fourth part thereof absolutely." The testator left neither widow nor children, and, at the time of his death, was a member in good standing of an incorporated mutual benefit society, which by its charter provided for the payment of a certain sum of money upon the death of any member, "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment. If there be no widow, child or children, or the deceased shall have made no disposition by will or assignment of the sum accruing upon his death, then the board shall appropriate such sum as may be necessary for funeral expenses, and all excess of money accruing from the death of such member shall go to the permanent fund of the association." In construing this provision of the charter, the court held that the fund was not assets of the estate of the deceased

¹ Duvall v. Goodson, 79 Ky. 224.

member, recoverable by his administrator or executor—that the widow, child or children of the member were the beneficiaries designated by it, subject to the right of the member to appoint other beneficiaries—that this *jus disponendi* given by the charter was a mere power of appointment; and the court further held that the will of the testator was not a valid exercise of the power, since the intention to exercise it was not expressed, and it did not appear that there was no other estate upon which it might operate; that in the absence of a valid exercise of the power, there being no widow, child or children of the deceased, the excess of the fund after payment of funeral expenses, should go to the permanent fund of the society.¹ Where the by-laws of a society provide that the benefit fund is to be paid “to the widow, children, mother, sister, father or brother of the deceased member, and in the order named, if not otherwise directed by the member previous to his death,” the relatives of the deceased will take the fund in the order named unless the member in his lifetime executed such power of direction or appointment, thus changing the order of payment, and the will of a member who died seized of real and personal property, devising and bequeathing to his children “my estate and property, real, personal and mixed,” without referring to the power or the subject of it, is not such an execution of the power as will control the fund; and the other provisions of the section of the by-laws above quoted control the fund, and give it to the widow of the testator, who is named as the first in order, and, therefore, the preferred beneficiary.²

§ 239. The charter and constitution of a society declared its object to be “to establish a benefit fund, from which a sum, not to exceed \$2,000, shall be paid, at the death of each member, to his family, or to be disposed of as he may direct,” and the certificate to each beneficiary member provided “that, in accordance with, and under the provisions of the laws governing the order, the sum of \$2,000 shall be paid, * * as a benefit, upon due notice of his death, to such person or persons as he may by will, or entry in the record book of this lodge, or on the face of this certificate, direct.” The court

¹ Maryland Mutual Benevolent Society, I. O. R. M. v. Clendinen, 44 Md. 429; 22 Am. Repts. 52; see Mory v. Michael, 18 Md. 241. ² Arthur v. Association, 27 Ohio State, 557.

held that, by the terms of the above contract, the benefit fund belonged to the member's estate, and passed under the residuary clause of his will, disposing of "the balance of all my property of every kind." The learned chancellor quoted the contract, laying particular stress upon the words—"or to be disposed of as he may direct"—"as he may by will direct"—and said: "The right to the fund and the power of the beneficiary to dispose of it in his lifetime, and by will, could not possibly be recognized more clearly."¹

§ 240. **Where the designation of a beneficiary is the execution of a power of appointment, it must be made according to the laws of the society.**—This principle is aptly illustrated by the case of *Sanger v. Rothschild*.² A member directed that the fund should be paid at his death to his uncle and aunt. He afterward married. The by-laws in force at the time the member died provided that, on the decease of a member, a fund of \$1,000 should be paid, *first*, to the widow; *second*, to the children, if there were no widow; *third*, to the parents, if there were no widow or children; but they empowered a member to designate any beneficiary of the fund, provided he left at least one-half thereof to the widow, if any, and if not, then at least one-half to the children, if any. It was claimed that the laws operated on the designation of the uncle and aunt as beneficiaries, only so far as to cut down their right and interest by virtue thereof to \$500, but the court held otherwise, and said: "The laws * required that 'in any designation which a member may make, at least \$500 must be left to his widow.' This designation leaves nothing to the widow, and therefore is not, in form or substance, in conformity with the law. A married member of this association may exercise the power of designation given by the laws. But in the designation he must leave his widow at least \$500, and he may leave her more, as he may determine; and, unless he exercises the power of designation in this way, his designation is wholly ineffectual, and the widow will take the whole fund, as provided in the laws. The widow is entitled to at least \$500, and in the absence of any designation by her husband of the amount she is to have, by what authority can her right be cut down to \$500 or any sum less than her \$1,000?"

¹ *Weil v. Trafford*, 3 Tenn. Ch. 103. ² 123 N. Y. 577; 26 N. East. Rep. 3.

§ 241. **Designation by special appointment.**—A member of a lodge had issued to him a benefit certificate in the sum of \$2,000, to be paid on his death to such person or persons as he might, by will, or entry on the record book of the lodge, or on the face of the certificate, direct. Before his marriage, he indorsed upon the certificate, the following: "To the officers and members of the Supreme Lodge, Knights of Honor. Brothers, it is my will that the benefits named in this certificate be paid to my sister, J. H.," to which his name was subscribed, and the same was attested by two witnesses. This indorsement was all printed except the words, "my sister J. H.," but the certificate with the indorsement was never delivered to the sister. His widow claimed that this indorsement was a will which was revoked by his subsequent marriage. The supreme court of Illinois held that, in view of the circumstances stated, it could not be regarded as a will, but a special direction to whom the benefit should be paid, in one of the modes authorized by the constitution of the lodge and the certificate.¹ The charter of a mutual benefit society provided that the beneficiary fund should "be paid over to the families, heirs or representatives of deceased members, or to such person or persons as such deceased members may while living have directed." Authority was also given to regulate such payments by suitable by-laws. One of the by-laws directed the fund to be paid to the person or persons last named by the deceased, and entered by his order on the "will book." The deceased member had had an entry made in the "will book," directing the fund to be paid to his brother. Afterward he made a will by which he gave and devised his interest in said fund, after payment of his just debts and funeral expenses, to the same brother. The administrator with the will annexed of the deceased brother brought an action to recover the fund, claiming that the will of the deceased revoked the appointment made in the "will book," and made the fund subject to the payment of the testator's debts. But the court held that the brother took the fund by virtue of the special designation in the "will book," and that the will was

¹ Highland v. Highland, 109 Ill. to be a will. McLean v. McLean, 6 366. Under the decisions of Tennessee Hump. 452; Tennessee Lodge v. see, such a designation might be held Ladd, 5 Lea. 716.

inoperative, and did not subject the fund to payment of the member's debts.¹

§ 242. **A designation is not necessarily revoked by the subsequent marriage of the member.**—It has sometimes been contended that a subsequent marriage revokes the designation of a beneficiary made by a member. This contention has probably been suggested by the fact that a contract of life insurance partakes somewhat of the nature of a will and by the further fact that, generally speaking, the member has the power of disposition of the benefit fund. But the law of wills has no application to the contract of mutual benefit insurance, and a designation of a beneficiary is not revoked by the subsequent marriage of the member, unless the contract of insurance so stipulates.² But the rights of members and beneficiaries in a mutual benefit society must be determined by its charter, constitution, by-laws and certificates, which form the contract of the parties, and the provisions of this contract may be so framed that a subsequent marriage of the member will revoke a prior designation. An unmarried man became a member of a society and appointed his uncle and aunt as his beneficiaries. Its laws provided that the benefit fund should be paid in the first instance to a member's wife or children, or secondly, if his wife be dead, to his children, but it was provided that "a married brother may bequeath one-half of the legal amount to either one or all of his children; five hundred dollars, at least, must be devised to his widow." He afterward married, and died, leaving a widow but no children. The court held that his marriage and death leaving a widow surviving him, rendered his first designation ineffectual, upon the unqualified direction that the money should in the first instance be paid to the wife of a deceased member, and said: "The case of *Highland v. Highland*³ also depended upon the peculiar provisions of the constitution of the order from which the money proceeded in that instance, and it materially differs, in its controlling facts, from this case. Here there can be no misapprehension as to the construction which should be placed upon the constitution or by-law of the order, for it in plain language contains the clear

¹ *Bown v. Catholic Mutual*, 33 see § 241; *Mass. C. O. O. F. v. Callahan* (N. Y.), 263. 146 Mass. 393; 16 N. East. Rep. 14.

² *Highland v. Highland*, 109 Ill. 366; ³ 109 Ill. 366.

direction that the money shall be paid in the first instance to the wife; and her right to it has in no way been rendered dependent upon or subject to any written or other direction of the member himself. It is secured to her in direct terms, as a fundamental part of the arrangement affecting the disposition of the amount to be paid. His marriage consequently annulled the preceding written designation in favor of (his uncle and aunt), and entitled the defendant, as the wife or widow of the deceased member, to this sum of money."¹

§ 243. **When the power to designate or change the beneficiary is exhausted.**—Where a by-law of a mutual benefit society provides that any member may in a certain manner change his beneficiary, or that he may in a certain manner designate the person to whom the benefit fund shall on his death be paid, such by-law means that the change or designation may be made from time to time, at the pleasure of the member; and the power of changing or designating the beneficiary is not exhausted by one or more changes or designations.² In fact the power of appointment of a new beneficiary, or the right to change the beneficiary, is the one thing given to the member by the very nature of the contract, and over that power or right no one has any control, except as it may be limited by the contract, or the law of the land. The right of its free exercise requires its continuance until the death of the member. The contract of insurance is between the member and the society, and, on the performance of the conditions of membership, the society agrees to pay the benefit to any person who may last have been made a beneficiary according to its provisions, or, if there is no provision on that subject, to the person whom the member may have designated in the manner and mode selected by him.³ This power to change, or appoint, being free and continuous, no right to

¹ *Sanger v. Rothschild*, 2 N. Y. 535; 3 Atl. Rep. 627; *Knights of Sup.* 794; 50 Hun 157; affirmed, 123 Hon. v. Watson, 64 N. H. 517; 15 N. Y. 577; 26 N. East. Rep. 3. Atl. Rep. 125; 6 N. Eng. Rep. 888;

² *Deady v. Bank Clerks' Mutual Ben. Association*, 17 J. & S. (N. Y. Sup'r Ct.) 246; *Masonic Mutual v. Burkhardt*, 110 Ind. 189; 11 N. East. Rep. 449; 10 N. East. Rep. 79; *Barton v. Provident Mutual*, 63 N. H. Mich. 587; 38 N. W. Rep. 588; *Beatty v. Supreme Commandery*, 154 Pa. St. 484; 25 Atl. Rep. 644.

³ § 214.

the benefit vests in the beneficiary named, until the death of the member.¹

§ 244. **The time within which the power of appointment or the right to designate a new beneficiary may be exercised.**—As the beneficiary of a member of a mutual benefit society has no vested right in the certificate of membership, it follows that the power of appointment of a new beneficiary, reserved to the member in the contract of insurance, may be exercised by him at any time during the existence of the contract. In this respect, there is an important difference between the power of appointment or the right to change the designation of a beneficiary reserved in the nature or by the provisions of the contract of mutual benefit insurance, and such a power or right reserved in an ordinary contract of insurance. In the ordinary contract the beneficiary has a vested right, and any power to appoint a new beneficiary on a certain contingency must, upon the happening of the event, be exercised at once, or within a reasonable time.² Of course, the

¹ §§ 212, 213.

² It was held in *Eiseman v. Judah*, 4 Central Law Journal 345, 1 Flippin, 627, that, where a policy is payable at the death of the insured to his wife, if then living, or if not living, then to her children, with the proviso, "that, in case of the decease of his wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy," such substitution must be made upon the decease of the wife, or within a reasonable time thereafter; it may not be made after the date fixed for the next ensuing payment of premium on the policy. The court says: "All the authorities upon life insurance agree that the rights of the children of the wife, in such cases, become, upon the death of their mother, *vested rights*, in the fullest sense of the term. This is not, then, a case in which, like most cases of appointment under a power, no reason can be assigned for an immediate execution of the power, so that the whole

lifetime of the donee of the power is allowed for its execution. Here, there are reasons for a prompt execution; for, if the power be executed, the rights under the policy already existing are to be taken away. Within what time, then, will the law allow the act of Ackerman to take away the rights thus already vested, by the death of his wife, in her children? This period can not be indefinite. Justice and equity require that the power thus conferred shall be exercised at some precise time, in order that the fact of its exercise may be duly made known to all persons interested; and no further latitude can be allowed to the donee of the power, than to give him a reasonable time within which he shall act under it, if at all. This reasonable time may well be the period ending with next ensuing payment of premium. At that date the policy will lapse by its own terms, unless a new premium is paid. Such payment will continue the policy in force, and will thus be,

power to appoint new beneficiaries at any time may, by special contract, be reserved to the assured in the ordinary contract of insurance, and, in such case, the distinction above referred to would not exist.

in some sense, the making of a new contract. The beneficiaries may well wish to know whether the policy is to continue in force for their benefit, or whether their interest is to cease. If the divestiture of their rights by the appointment of a new beneficiary could be accomplished a year after those rights accrued, it might equally well be postponed for twenty years, during which time the beneficiaries might pay forty semi-annual premiums, instead of one as in this case. I am constrained to hold the provision for such an appointment, 'in case of the decease of the wife,' to mean 'upon the decease,' indicating that event as the proper time; and to treat the time of the next succeeding payment of premium as the latest hour which can equitably be allowed for a divestiture of rights theretofore existing."

CHAPTER XVII.

MEMBERSHIP FEE.

- § 245. Note given for membership fee.
- 246. Cash payment of fee.
- 247. Recovery of membership fee from society.

§ 245. **Note given for membership fee.**—The by-laws of some societies provide that the membership fee need not be paid in cash, but that the new member may execute his note for the amount, payable at a certain time. In such cases, the contract of insurance usually provides that, if any such note shall not be paid when due, all claim against the society shall be forfeited, and the policy shall be void. When the contract of insurance makes such provision for forfeiture, the payment of the note at maturity is a condition precedent, and it is for the member to make prompt payment. The society need give no notice of its election to hold the policy forfeited, nor need it demand payment of the note at maturity. But where the note only, and not the contract of insurance, makes provision for forfeiture of the policy upon its non-payment, the payment of the note is a condition subsequent, making the policy merely voidable at the election of the society, and, in order to forfeit the policy for non-payment, the society must exercise the right of election promptly. It must demand payment at maturity; if the note is entitled to days of grace, it must demand payment on the last day of grace, during the business hours of the day; and if payment is not then made, it must declare the policy forfeited and void. It is not essential to the declaration of forfeiture that the note be returned to the maker at once. The society is, of course, bound to return it, but it may do so during the pendency of legal proceedings contesting the forfeiture.¹ Where a contract of insurance

¹ May on Insurance at section 342; Bliss on Life Insurance at sections 182-187.

contains no express stipulation that the failure to pay a note given for membership fee, when due, will render the policy void, and, after a note so given becomes due, the time of payment is extended by the society, and death occurs before this time of payment runs out, no forfeiture of the contract can be declared for non-payment of the note when first due.¹ If a society takes a draft on a third person, which is governed by the laws of commercial paper, in payment of an assessment or membership fee, this implies an undertaking on its part to present the paper for acceptance or payment, and to give the necessary legal notice of refusal to accept or pay, the same as any other holder of such paper must do; and a failure to do this will save a forfeiture of the policy, although the paper and the policy itself contain an express provision that the policy shall be void for any omission to pay at maturity a note, other obligation, or indebtedness taken for any assessment or membership fee, unless the neglect to make demand and give notice is excused by want of funds, and the absence of a reasonable expectation by the drawer of acceptance or payment by the drawee.²

§ 246. **Cash payment of fee.**—Where an application for a certificate of membership declares on its face that payment of the membership fee is a condition precedent to the issuing of the certificate, the certificate is not in force until the membership fee is actually paid. Where the prepayment of the membership fee is made an essential part of the agreement, no agent can dispense with its requirement.³ Where the charter provides that the member shall, before he receives his certificate, deposit with the treasurer the sum of twenty-five cents for every one thousand dollars of insurance, and it is shown that he paid the twenty-five cents by "paying for the drinks," and that the certificate was issued to him, it was held that the court properly left it to the jury to say whether there was in fact a proper payment of this fee.⁴ In action on a certificate of

¹ *Kansas Protective Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275. *Benefit Association v. Conway*, 10 Ill. App. 348.

² *Pendleton et al. v. Knickerbocker Life, etc.*, 5 Fed. Rep. 238; 7 Fed. Rep. 169. ⁴ *Farmers' Mutual v. Mylin*, 2 Monaghan (Pa.) Supreme Ct. Cas. 459; 15 Atl. Rep. 710; see *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *German Ins. Co.*

³ *Ormond v. Fidelity Life Association*, 96 N. C. 158; 1 S. E. Rep. 796; *v. Ward*, 90 Ill. 550.

membership, where the defense was non-payment of the fee required as a condition precedent to membership, it appeared that the society had forwarded the certificate to deceased, who was one of its agents; that the accounts between him and the company were confused; that on one occasion they had returned to him part of a remittance he had sent them, on the ground that it was an overpayment; that they had published his name in the list of members, and had levied a mortuary assessment on him as if he were a member, and it was held that the evidence warranted the jury in finding that the fee had either been paid, or its payment waived, as a condition precedent.¹

§ 247. **Recovery of membership fee from society.**—A member of a masonic lodge, or other society not for profit, can not, on his expulsion, recover for the initiation fees voluntarily paid by him, when no fraud is practiced on him. His expulsion does not work a rescission of the contract under which such fees are paid.²

¹ Bankers' Ass'n v. Stapp, 77 Texas 517; 14 S. W. Rep. 168.

² Robinson v. Yates City Lodge, etc., 86 Ill. 598.

CHAPTER XVIII.

ASSESSMENTS.

§ 248, 249. Generally.

250, 251. Assessments must be properly levied and for proper purposes.

252. The act of levying an assessment is ministerial.

253. Custom in levying assessments.

254. Assessment for reserve fund.

255. Assessment in anticipation of losses.

256. Effect of the levy of an assessment.

257-259. Notice of assessment.

260, 261. Notice by mail.

262. Date of notice given by mail.

263. Date of assessment, date of notice.

264. Notice by publication.

265. Notice of date of payment.

266. Service of notice.

267. Agreement of society to give notice to the beneficiary.

268, 269. Insufficient notice of assessment.

§ 248. **Generally.**—The main feature of the plan of mutual benefit insurance is that death losses are paid by the voluntary contributions of the surviving members of the society, made upon a fixed and definite plan. According to this plan, on the death of a member in good standing the society levies an assessment upon the surviving members. This assessment does not make a member holding a certificate a debtor to the society, so as to authorize it to bring suit against him to recover the amount of it in case of his neglect or refusal to pay, but non-payment within the stipulated time for the payment of the assessment operates either to suspend his right to benefits, or as a resignation of his membership and a relinquishment of all claim upon the society for past contributions and future benefits. A surviving member may maintain his relations with the society by paying the assessment according to the terms of the contract, but this is wholly optional with him. The obligatory part of the contract is unilateral and on the part of the society;

it must pay the benefit to the beneficiary of a member who at the time of his death was in good standing.¹ A covenant in a contract of insurance that any omission or neglect to pay assessments levied by the society, after notice, shall render the contract null and void, does not, in the absence of an agreement to pay such assessments, constitute a contract to pay, but leaves it optional with the member to pay or forfeits his rights. This may at first impression seem an improvident contract on the part of the society, but it is after all very similar to the ordinary contract of insurance. On procuring ordinary insurance, the insured or the beneficiary pays the premium for one year. Just before the expiration of the year he may keep the contract in force, by paying the premium for another year, but if he fails to make another payment, the insurance expires and all contractual relations between him and the company are at an end. A member on entering a mutual benefit society pays an admission fee and when a death occurs among its members an assessment is levied on him. If he pays this assessment within the stipulated time, the insurance is in force, until the time limited for the payment of the next assessment. Whenever he fails to pay within the stipulated time, he forfeits his membership and his rights under the contract. Under both plans the continuance of the insurance by the payment of the amount agreed upon is optional with the insured.²

§ 249. Without doubt, this general plan of insurance may be modified by the charter, by-laws or certificate of membership of a society, and the contract may be so framed as to make the member liable for all assessments levied after its execution and until the date of its forfeiture. Since the society is liable on its contract until such time as the member's rights are forfeited for non-payment of an assessment, there is nothing unjust in binding him to pay all assessments made during

¹ *In re Protection Life*, 9 Bissell 188; *A. O. U. W. v. Moore* (Ky.), 9 Ins. L. J. 572; *Burdon v. Association*, 147 Mass. 360; 17 N. East. Rep. 874; 6 N. Eng. Rep. 840; *Chicago Mutual v. Hunt*, 127 Ill. 257; 20 N. East. Rep. 55; see *Ellerbe v. Barney* (Mo.), 25 S. W. Rep. 384; *Ellerbe v. Faust* (Mo.), 25 S. W. Rep. 390.

² In mutual fire insurance, a premium note is given, payable in installments as assessments are made to pay losses, and there is, of course, a promise to pay which may be enforced.

his membership while pecuniary rights may accrue to his beneficiary. A by-law of a society provided that "upon the death of any member of the association, it shall be the duty of the secretary to notify the members of the same, and thereupon each member shall, within thirty days after such notification, pay to the secretary the amount required by the rules of the association." Another by-law provided that if any member should neglect to pay any dues or assessments required by the by-laws, "then, and in such case, such membership shall cease and determine at once without notice, and all claims be forfeited to the association." In construing these provisions of the by-laws, the court held that the neglect to pay an assessment for thirty days after notice thereof, *ipso facto*, determined the membership of the delinquent; that the spirit and tenor of the first by-law above quoted was an agreement of the member to pay any death loss or assessment made during the time he should continue a member of the association; that he was liable for the amount of all assessments made prior to the time when he ceased to be a member, and that, upon his failure to pay, an action would lie against him therefor.¹ But because of the small amount of each assessment, the cost of collecting it, and their widely scattered membership, such societies do not ordinarily seek to make their delinquent members liable for assessments, under any circumstances, but make rigid provision for forfeiture in case of non-payment. In ordinary insurance the amount which the insured is to pay is called the premium, while in mutual benefit insurance it is called an assessment. A periodical payment of a certain sum by a member is not an assessment within the meaning of that term as used in insurance.²

§ 250. **Assessments must be properly levied, and for proper purposes.**—Assessments must be legally made, in order that the failure of a member to pay them shall work a forfeiture of his rights of membership. They can only be valid when laid under the conditions stated in the charter and by-laws, and for the purposes named therein. They must be made in strict conformity with the authority given to the so-

¹ McDonald v. Ross-Lewin, 29 Hun ² Smith v. Brown, 27 N. Y. Supp. 87; Smith v. Brown, 27 N. Y. Supp. 11.

ciety in the charter and by-laws, and in accordance with the contract of insurance.¹ Even a more equitable mode than that provided for may not be adopted. Where the charter authorizes the directors to make an assessment, it can be made only by them. Where the laws of the society authorize directors to make assessments, they have no arbitrary discretion in the matter, but are controlled by the explicit provisions of the powers delegated to them; and assessments may not be made unless the necessity therefor properly and legally arises.² The requirements of the by-laws of a mutual benefit society, that all assessments shall be made by the board of directors, and that the chairman shall approve all proofs of death, are satisfied when the secretary and treasurer submits a notice of death to a meeting of the board which directs that its chairman shall examine the proofs when they shall arrive, and if found correct, the secretary shall issue notices of assessment thereon.³ When the assessment is authorized and required to be made by the directors of the society, it is not invalid because the directors who made it were personally interested therein as members of the society; nor because one director was absent when it was made.⁴ Where the charter gives to the directors of a society power to levy assessments upon its members to pay losses, an assessment made by a minority of the directors is invalid. And the fact that the majority of the directors appointed the minority as a committee to make the assessment, does not make such assessment valid.⁵ When the by-laws so provide, the board of directors must levy the assessment.⁶

The liability of the member is conditional, and depends upon the contingency of death losses, and the incurring of expenses, to which he is liable to contribute, which have been duly ascertained by the proper officers, and which make necessary a

¹ *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Susquehanna Mutual v. Gackenhach*, 115 Pa. St. 492; 9 Atl. Rep. 90.

² *Farmer's Mutual v. Chase*, 56 N. H. 341; *Thomas v. Whallon*, 31 Barb. 178; *Pacific Mutual v. Guse*, 49 Mo. 332; *Traders' Mutual v. Stone*, 9 Allen, 483; *People's Ins. Co. v. Bab-bitt*, 7 Allen, 235; *Rosenberger v. Ins. Co.*, 87 Pa. St. 207.

³ *Passenger Conductors v. Birn-baun*, 116 Pa. St. 565; 11 Atl. Rep. 378; 10 Cent. Rep. 63.

⁴ *Williams v. German Mutual*, 68 Ill. 387.

⁵ *Monmouth M. F. Ins. Co. v. Lowell*, 59 Me. 504.

⁶ *Farmers' Mutual v. Chase*, 56 N. H. 341.

resort to an assessment upon the certificate. The promise of the member is to pay, or forfeit his membership, upon such conditions, and the existence of these conditions must be established before a levy of an assessment is valid and binding. An assessment made in good faith, upon correct principles, and substantially correct, is binding.¹ All assessments made pursuant to the charter and by-laws, or to the constitution and by-laws, are *prima facie* reasonable and valid. The right to levy assessments or dues upon members of the society is governed, to some extent at least, by the occasion for them.² Where the rules of a mutual benefit society required the supreme secretary, when the benefit fund was insufficient, to notify the subordinate secretaries to collect a fixed assessment, it was held in an action on a certificate of insurance issued by such society, that the notice from the supreme secretary was presumptive proof that the assessment was necessary, since acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.³ The levying of assessments at the regular meeting of the directors, or other proper officers, is presumably a part of the business of the society, and no notice of an intention to make an assessment is necessary, unless required by the charter or by-laws. The by-laws may authorize the proper officers to lay an assessment at a meeting called for that purpose.⁴ Where a table of rates of assessment has been published by a society, and is made a part of the contract of insurance, the assessment must be made in strict conformity with the prescribed table, and the board of directors has no power to change these rates without the consent of the insured member.⁵

§ 251. A society organized as a corporation under the

¹ Marblehead Ins. Co. v. Underwood, 3 Gray 210.

² Pulford v. Fire Department, etc., 31 Mich. 458; Hibernia, etc., Co. v. Harrison, 93 Pa. St. 264; Rosenberger v. Washington Fire Ins. Co., 87 Pa. St. 207.

³ Demings v. Supreme Lodge, 131 N. Y. 522; 30 N. East. Rep. 572; reversing, 14 N. Y. Supp. 834.

⁴ Ins. Co. v. Sawyer, 12 Cush. 64; Fayette Mut. v. Fuller, 8 Allen (Mass.) 27.

⁵ York County Mutual v. Myers, 11 Weekly Notes of Cases 541; see Atlantic Mutual v. Sanders, 36 N. H. 254; Atlantic Mutual v. Moody, 74 Me. 385.

laws of a state can not subject itself or its members to the jurisdiction of an authority existing outside of the state and beyond the control of its laws. A grand lodge of the Ancient Order of United Workmen, incorporated under the laws of the state of Michigan, can not compel its members to pay assessments made under the orders of a supreme lodge incorporated under the laws of Kentucky, and not subject to the courts of Michigan; nor can it suspend members from their privileges as such, for refusing to pay such an assessment. In discussing this subject the court said: "The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the state permitting it, nor could there be any law of the state which would subject a corporation created and existing under the laws of this state to the jurisdiction and control of a body existing in another state and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being."¹

An assessment to pay losses and expenses, where the charter authorizes an assessment only to pay losses, is invalid.² A vote to make an assessment, leaving the amount in blank, is invalid.³ An assessment is not invalid, and can not be resisted on the ground that payment of the claim for which the assessment is made, might have been successfully resisted on technical grounds, and ought not to have been favorably passed upon by the board of directors.⁴

An assessment laid on all the members of a mutual benefit society to pay liabilities for losses and expenses, part of which accrued before some of them became members, is valid as to the old members, but void as to the new ones, unless the contract of insurance provides for the payment of all assessments which may be levied after the issue of the certificate to the member, and does not limit the liability of new members to such losses and expenses as may thereafter accrue.⁵ If the

¹ Lamphere v. United Workmen, 47 Mich. 429; see *State ex rel. v. Miller*, 66 Iowa 26; 23 N. W. Rep. 241.

² Mutual Ins. Co. v. Paige, 1 Hilton (N. Y.) 430.

³ Sands v. Hill, 42 Barb. (N. Y.) 651.

⁴ Bersch v. Sinnissippi Ins. Co., 82 Ind. 64.

⁵ Ins. Co. v. Houghton, 6 Gray 77; Roswell v. Equitable Aid Union, 13

contract provides that an assessment shall be made on all members upon whom the degree of the order "was conferred on or prior to the date of the death of the deceased brother," the word "date" has application to the entire day, and a member who took the degree in the evening is liable to assessment for a death loss which took place on the morning of that day.¹ Where the laws of the society require that an assessment shall be levied *without delay*, on the death of a member, a prolonged delay will not necessarily vitiate the assessment when made. The circumstances attending the delay—a controverted liability upon the certificate, a litigation to determine the rights of the parties thereunder, and similar matters, may be shown as an excuse for the delay in levying the assessment.² In an action on a certificate, where the defense is that an assessment was not paid in due time, the burden is on the society to show a duly authorized and properly levied assessment.³ Where the payment is accepted conditionally by the society, the payment of an assessment by a member does not estop the beneficiary to question the validity of the assessment, and the burden of establishing its validity is on the society.⁴ Where a member refused to pay certain assessments which he supposed the society had authority to make, but which were unauthorized and invalid, it was held that his beneficiary was entitled to recover on the contract after his death upon payment of all assessments due.⁵

§ 252. **The act of levying an assessment is ministerial.**—In making assessments upon its members, a society acts in a ministerial, not in a judicial, capacity. No presumption, therefore, arises in favor of the regularity or legality of its assessment. Every fact authorizing an assessment to be made must exist, and every act required of the society must be performed, before an assessment can be levied, which a member must pay, or forfeit his rights of membership.⁶ It may be stated, as a

Fed. Rep. 840; *Knights v. Supreme Commandery*, 6 N. Y. Supp. 427; 289; 35 N. East. Rep. 855; see §§ 322, *Evarts v. Association*, 16 N. Y. 323. Supp. 27.

¹ *Eaton v. Supreme Lodge*, 22 Cent. Law Jour. 560.

² *People's Ins. Co. v. Allen*, 10 Gray 297.

³ *Shea v. Association*, 160 Mass. 289; 35 N. East. Rep. 855; see §§ 322, Supp. 27.

⁴ *Shea v. Association*, *supra*.

⁵ *Colby v. Life Indemnity Co.* (Minn.). 59 N. W. Rep. 539.

⁶ *Hogan v. League*, 99 Cal. 248; 33 Pac. Rep. 924; *American Mutual v.*

general proposition, that when a society relies upon the failure of a member to pay an assessment as a forfeiture of his membership and the benefits thereof, it must show that the assessment was made by the proper authority, for a proper purpose, in the manner indicated in the source from which it derives its power to make the assessment, and in accordance with the contract of insurance.¹ The contract of insurance may make the records of a society levying an assessment *prima facie* evidence of the legality of the assessment laid. In such case, the mere introduction of the records, or a properly certified copy, showing the levy of an assessment upon its members, and proof of the non-payment thereof, will cast upon the party suing upon the contract the burden of showing that because of some act or omission of the society, the assessment is invalid, or that the purpose of the assessment is illegal.² The law or contract may also provide that the record of losses kept by the society shall be *prima facie* evidence that such losses have occurred.³

It has been held with much force of argument, and upon well founded principles, that where the records of a society show that an assessment was made upon its members, and that a forfeiture of the rights of a member was declared in his lifetime for the failure to pay it, the record is at least *prima facie* evidence in respect to the rights of the beneficiary.⁴

Helburn, 85 Ky. 1; 2 S. W. Rep. 495; 8 Ky. Law Rep. 627.

¹ American Mutual v. Helburn, *supra*; Mut. Ins. Co. v. Houghton, 6 Gray 77; see § 251.

² Williams v. German Mutual, 68 Ill. 387.

³ People's Ins. Co. v. Allen, 10 Gray 297; Susquehanna Mutual v. Gackenbach, 115 Pa. St. 492; 9 Atl. Rep. 90.

⁴ Bagley v. Grand Lodge, 131 Ill. 498; 22 N. East. Rep. 487. The court said: "The (instruction) was in substance, that it was not necessary for the defendant to prove the deaths of members, or that they were members of the order, or any other matters set forth in the certified copy of the record of the grand lodge of the call for the assessments in

question, otherwise than by such copy; and that said certified copy of the record was sufficient evidence of the facts therein stated, for the purposes of the case, without any further evidence of such matters. It is claimed this record was not competent evidence of the existence of the conditions precedent to the making of the assessments, for the non-payment of which a forfeiture was declared. Section 17 of article 9 of the constitution of the order made express provision whereby a member might, at his option, at any time change the beneficiary in the certificate held by him; and plaintiff had no vested interest in the certificate of the deceased member, under whose certificate she claims, before the death of

Where under the laws of a society the duty of making an assessment is imperative under certain circumstances, and no form or mode of making it is prescribed, and no record of it is required to be kept, it is not necessary that such assessment be formally made by the society or that it be entered in its records, but it may be proved by parol that an assessment was actually levied.¹ In such a case there being no established rule prescribing how an assessment shall be made, any action which clearly shows an intent to call upon the members to pay the stipulated amount into the benefit fund will be sufficient. The notice of the assessment may be made to supply all the deficiencies and irregularities of such an assessment, by stating when, where, and to whom it may be paid.²

§ 253. **Custom in levying assessments.**—Where the pretended assessment has not been made in accordance with the provisions of the constitution of the society, it is incompetent to show that it was made in accordance with the custom of the society, unless it is further shown that the member who failed to pay such pretended assessment had knowledge of the custom.³

such member. The assessments and the record were made, and the cause of forfeiture accrued, and the forfeiture was declared, in the lifetime of the deceased. He being a member of the association, the records made by it were evidence against him. The assessments were against him, and it was his right which was forfeited, if there was any lawful forfeiture, and not any right which was vested in plaintiff, and, if the forfeiture was valid, no right ever did vest in plaintiff. If the theory of plaintiff is correct, and it is required of defendant to establish, in the first instance, otherwise than by its record, and by direct and affirmative testimony all the conditions precedent to the call of the assessments, then the burden would be imposed upon it of producing the witnesses to prove the death of every member who had died since the incorporation of the order whose beneficiary certificate had been paid, and that every such member

was in good standing when he died, and also of showing every dollar paid into the beneficiary fund, and paid out of that fund, during the same period of time. All this would be necessary in order to show what moneys had been received, and what payments had been made, by reason of which the beneficiary fund had fallen below \$2,000, and a new assessment thereby justified under the laws and regulations of the order. The record of the association is at least *prima facie* evidence in respect to the rights of its members, but probably subject to contradiction by proof of fraud, mistake, or other matter in rebuttal."

¹Backdahl v. Grand Lodge, 46 Minn. 61; 48 N. W. Rep. 454.

²Marsh v. Burroughs, 1 Woods 463; Citizens' Ins. Co. v. Sortwell, 10 Allen 110; Fox v. Company, 46 Ind. 31; Rutland v. Thrall, 35 Vt. 356.

³Underwood v. Iowa Legion of Honor, 66 Iowa 134.

§ 254. **Assessment for reserve fund.**—The society stands in the relation of agent and quasi trustee for its members, and, as such, it is burdened with certain duties. It is obviously the duty of the officers of the society to observe and perform with care all the requirements of the laws, rules and regulations of the society and the provisions of the certificate of membership, relative to the levying of an assessment, so that, whether the burden of proof in the matter be upon the society or its adversary, in a legal proceeding, it can easily and certainly be shown that they have done all that the society has by law or contract been required to do and perform, and that the assessment is for a proper purpose.

An assessment for an improper and unnecessary purpose is invalid, but, in determining what are proper and necessary purposes for which a mutual benefit society may levy an assessment, the laws and contracts governing the society should receive a liberal construction. But where such a society is not inhibited by its charter it still has no right to provide, in its by-laws and contracts, for the accumulation of a reserve fund.¹ While it is not intended that such associations shall become great financial institutions with growing accumulations and holdings of large sums of money and investment securities, it is still proper that they should strengthen their financial ability to pay large losses in unusual emergencies, when authorized so to do by its charter. The legislatures of several states, recognizing the propriety of a reserve fund in such societies, have passed laws providing for such a fund, and regulating its management, investment and disposition. Certainly, no just reason presents itself why such societies should not be permitted to hold a reserve or guarantee fund for the protection of its members. The board of directors, or other officers charged with the management of the affairs of a society, must of necessity be permitted to exercise their discretion to a great extent in the management of the reserve fund; and where such fund has not exceeded any limit which the law may have placed upon the amount which may be held as a reserve, it must be left to the discretion of such officers, whether they will pay a loss in whole or in part from this fund, or levy an

¹ Kennan v. Rundle (Wis.), 51 N. W. Rep. 426; Rundle v. Kennan, 81 Wis. 212; 48 N. W. Rep. 516.

assessment upon the members to pay it. The idea of a reserve fund imports permanency to some extent, and if losses were required to be paid out of this fund, as they occurred, the fund would soon be depleted and destroyed, and the very object for which it was created would be defeated. A member can not, therefore, insist that the amount of money held in the reserve fund shall be applied to the payment of losses, before he be required to pay his assessment. The officers of the society may use a part or all of the fund to pay death losses, but they can not be compelled to do so. It is in their discretion to hold the reserve fund, and lay an assessment to pay the loss.¹ The validity of an assessment is not affected by the fact that the benefit has already been paid, where the payment was made out of the reserve fund created by initiation fees under authority of the charter, and the assessment is levied to reimburse such fund.²

§ 255. **Assessment in anticipation of losses.**—In order to determine whether assessments may be made in advance and in anticipation of losses, it is necessary to look to the provisions of the contract of insurance—the charter, by-laws and certificate of membership. Where the contract provides that, upon the death of a member, the directors shall examine into the loss, and, if they shall find the claim of the beneficiary of the member to be valid against the society, they shall levy an assessment upon the members to pay the claim, no assessment may be made in anticipation of losses.³ When the laws of the society do not authorize an assessment unless the amount in the treasury is less than a certain stated sum of money, and there is more than that amount in the treasury, an assessment may still be levied, if orders have been drawn against the fund to pay death losses, sufficient when paid to reduce the amount below that sum. It is not necessary in such a case to await payment of the outstanding orders. Since the money has been appropriated to the payment of certain claims, it is

¹ Crossman v. Mass. Mutual, 143 Pac. Rep. 924; Thomas v. Whallon, Mass. 435; 9 N. East. Rep: 753; 3 N. 31 Barb. (N. Y.) 172; Ins. Co. v. Eng. Rep. 517. Schmidt, 19 Iowa, 502; Pacific Mutual v. Guse, 49 Mo. 329; Rosenberger v. Washington Fire Ins. Co., 87 Pa.

² McGowan v. Supreme Council, 28 N. Y. Supp. 177.

³ Hogan v. League, 99 Cal. 248; 33 St. 207.

not in the treasury so as to prevent an assessment to provide for the payment of a further claim which has been allowed.¹

§ 256. **Effect of the levy of an assessment to pay a death loss.**—The mere levy of an assessment by a society upon its members to pay a death loss, unaccompanied by any act recognizing the validity of the contract of insurance, is not a waiver of a forfeiture which has been worked in such contract; and the fact that, after the death of the member, the other members paid into the treasury of the society their voluntary assessments to meet the amount of the insurance, gives the beneficiary no additional rights.²

§ 257. **Notice of assessment.**—In beneficiary associations, where the time and frequency of payments depend on the mortality of members, and payment is to be made only upon notice that an assessment is required, no liability is imposed on a subordinate lodge, or a member of the society, until due notice in conformity with the laws of the order or society is given. The giving of notice is a condition precedent, and good standing is not lost by a failure to pay an assessment of which no notice was given through the fault or misconduct of a supreme lodge or society, or its officers.³ The giving of the notice being a condition precedent, the facts showing that the notice provided by the contract of insurance has been given, should be set out in pleading, and proved at the trial, and an averment that legal notice of the assessment was duly given is a conclusion of law and insufficient.⁴ Where the only means which a subordinate lodge, or a member of a benefit association has of knowing when an assessment is due to the order or association, is by a notice from the supreme lodge or governing body, unless notice is given, no rights are lost. When, in the contract, a notice is provided for, and not given, no tender of the amount of any assessment is necessary in

¹ Eaton v. Supreme Lodge, 22 Cent. Rep. 450; Agnew v. A. O. U. W., 17 Law Jour. 560.

² Swett v. Citizens Mutual, 78 Me. 541; 7 Atl. Rep. 394; Mayer v. Equitable Reserve Fund, 42 Hun (N. Y.) 237; Bock v. A. O. U. W., 75 Iowa, 462; 39 N. W. Rep. 709.

³ True v. Association, 78 Wis. 287; 47 N. W. Rep. 520; Farrie v. Supreme Council, 15 N. Y. St. Reporter, 155; Hall v. Sup. Lodge K. of H., 24 Fed. Rep. 450; Agnew v. A. O. U. W., 17 Mo. App. 254; Castner v. Farmers' Ins. Co., 50 Mich. 273; 15 N. W. Rep. 452; Bates v. Mut. Ben., 47 Mich. 646; Gellatly v. Mut. Ben., 27 Minn. 215; 6 N. W. Rep. 627; Covenant Mut. v. Spies, 114 Ill. 463; Mulroy v. Knights of Honor, 28 Mo. App. 463.

⁴ Coyle v. Kentucky Grangers (Ky.), 2 S. W. Rep. 676.

order to prevent a forfeiture of membership. A member is entitled to notice of an assessment, before he can be declared in default for his non-payment.¹ Although the charter provides for a forfeiture where the member has failed to pay within thirty days after notice has been "served on him or sent to him," the time does not begin to run until he has had actual notice. An allegation by the society that "it sent him notice" on a certain day, and that "he received the same," does not allege the time at which he received the notice, and is, therefore, not sufficient to show that there was a forfeiture.² Where the contract provides that notice of assessments shall be sent by the supreme council to the assessment collectors of subordinate councils, who shall notify the members; that the notice to members shall bear the date of the notice to assessment collectors; and that unless a member pay the assessment within forty days from the date of the notice he shall stand suspended, the member is entitled to actual notice of the assessment before his rights can be forfeited for non-payment.³

Where a contract provides that it shall be forfeited and void, unless payment of an assessment is made within thirty days from date of notice thereof, there must be actual notice to the member of the assessment before a forfeiture will result from non-payment.⁴ Where, under such a contract, a notice which has been sent by mail, is received at the house of the member while he is so ill as to be unable to understand or transact any business, and he so remains until his death, no forfeiture arises, since the provision requires actual notice to the member.⁵ The essential requisite of actual notice is information.⁶

The charter of a society provided that members were to be

¹ Hall v. Supreme Lodge, 24 Fed. Rep. 450; Covenant Mutual v. Spies, 114 Ill. 463; Supreme Lodge v. Dalberg, 138 Ill. 508; 28 N. East. Rep. 785.

² American Mutual Aid Society v. Quire, 8 Ky. L. Rep. 101.

³ People v. Supreme Council, 10 N. Y. Supp. 248; Supreme Lodge v. Johnson, 78 Ind. 110.

⁴ Courtney v. Association (Iowa), 53 N. W. Rep. 238; Supreme Lodge v. Dalberg, 138 Ill. 508.

⁵ Courtney v. Association, *supra*.

⁶ Knights v. Supreme Council, 6 N. Y. Supp. 427; Supreme Lodge v. Wickser, 72 Texas 257; Taggart v. Association, 8 Pa. Co. 334; Schmidt v. German Mutual, 4 Ind. App. 340; 30 N. East. Rep. 739; Merriman v. Association, 138 N. Y. 116; 33 N. East. Rep. 738; affirming 18 N. Y. Supp. 305; Benedict v. Grand Lodge, 48 Minn. 471; 51 N. W. Rep. 371.

"notified by the society or otherwise, either by circular or a verbal notice" of assessments made upon them for losses, and that, if they did not pay within sixty days, their rights under their policies should be forfeited. In construing this clause of the charter, the court said: "Was the fact of mailing the paper which contained the information for the member sufficient of itself to constitute the notification required by the charter? The proposition here is that it makes no difference whether the member ever gets knowledge of the assessments upon him or not, provided notice is regularly mailed to him, and, therefore, the contention is to be viewed on the assumption that he does not get it. * * The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the persons insured eventuate in widespread loss and injustice. No construction open to so much objection, should be admitted unless rendered necessary by the terms of the charter; and they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed or sent or forwarded. The members are to be 'notified,' that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members, or by delivery to them of written statements through the agency of the postoffice or some other."¹ Where the contract of membership provides that "any member who shall refuse or neglect to pay all assessments and who having been notified by the secretary of his indebtedness, shall still neglect or refuse for sixty days after receiving said notice to cancel his indebtedness, shall be dropped from the roll of membership," the secretary has no right to drop a delinquent member from the rolls unless he has received actual notice of his delinquency.²

§ 258. Where the by-laws require written notice of an assessment to be given, proof of any other notice is properly excluded.³ A notice must in its essential features conform to the law or to the contract under which it is given.⁴ Notice

¹ *Castner v. Farmers' Mutual*, 50 Mich. 273; 15 N. W. Rep. 452.

³ *Dial v. Valley Mutual*, 29 S. C. 560; 8 S. E. Rep. 27.

² *People v. Association*, 8 N. Y. Supp. 675.

⁴ *Phelan v. Ins. Co.*, 113 N. Y. 147; reversing 42 Hun 419; *Mueller v. U.*

of assessment should not be given until the assessment has been made.¹ If the assessment be properly levied, but no proper notice thereof be given, no forfeiture is incurred by failure to pay it.² Notice from the secretary of a mutual benefit society is notice from the society, and the society is bound by the act.³ A notification to pay an assessment to a certain specified officer, whose address is given, must be complied with; and no other person, in the absence of any provision of the contract of insurance to the contrary, has the legal right to accept or decline to receive assessments, so as to bind the society to the consequences of such acceptance or refusal.⁴ Where a member is to make payment of an assessment within thirty days from date of notice thereof, the day on which he receives the notice will be excluded.⁵ The charter of a society provided that "any member failing to pay his assessment within thirty days from the date of the notice, shall forfeit his membership." In a suit upon one of its contracts, it was shown that notice of the assessment was received by the member on October 31, 1882. The amount of the assessments due was tendered to the association on December 1, 1882, and the association declined to receive it. The court held that, in computing the time within which the money should have been paid, the day on which the notice was received by the member should be excluded, that the money should have been paid prior to the close of business hours on November 30, 1882, and that the association had a right to decline to receive the amount of the assessments tendered on December 1, 1882.⁶ A by-law requiring a certain form of notice of assessments to be given to members under a corporate or official seal, and providing that no paper issued by authority of the society should be official unless thus sealed, may be waived, and the evidence is sufficient to warrant a

S. Association, 51 Ill. App. 40; Warner v. National Life (Mich.), 58 N. W. Rep. 667.

¹ Bangs v. McIntosh, 23 Barb (N. Y.) 591.

² Frey v. Mutual Ins. Co., 43 U. C. (Q. B.) 102.

³ Ohmstead v. Farmers' Mutual, 50 Mich. 200.

⁴ Lazensky v. Supreme Lodge K. of H., 3 N. Y. Sup. 52; 19 N. Y. St. Rep. 795.

⁵ Protection Life v. Palmer, 81 Ill. 88; Wetmore v. Mutual Aid, 23 La. Ann. 770.

⁶ National Mutual v. Miller, 85 Ky.

88; 2 S. W. Rep. 900; see § 265.

finding of a waiver when it establishes an unbroken usage for years on the part of the society to give notices not so sealed, and on the part of all its members to treat such notices as sufficient.¹

§ 259. The fixing of a precise time within which notices are to be sent to members can have no other purpose than to secure promptness in collecting assessments. Hence, the requirement as to the time within which notices shall be sent is to be construed as being in its nature directory, and not essential.² In the case of *Ancient Order United Workmen v. Moore*,³ the principle is laid down that if ample notice is given, it is not necessary that the full time allowed by the charter shall intervene between the date of the assessment and the suspension of the rights under the benefit certificate. The constitution of a society provided that "written notices of assessment shall be made and sent by the financiers, bearing date of not later than the 8th of the month, in which the notice was issued by the supreme recorder, twenty days from the date of such notice by the financier, and not later than the 28th day of said month in which said notice of assessment was given, any member holding a certificate of the beneficiary fund, having failed or neglected to pay such assessment into the beneficiary fund, in his subordinate lodge, shall forfeit all his rights under such certificate." The court says: "Although the notice required to be given by the financier was not sent until the 9th or 10th of February, there was ample time, after it was sent, to pay the assessment before the 28th, and the law required it to be paid on that day, although there was not twenty days between the day the notice was sent, and the 28th day of the month." But in such a case as this, if the member were to die immediately after the 28th of the month, the question would become important whether the twenty days within which payment should be made runs from the 8th of the month or from the time of receiving the notice.

§ 260. **Notice by mail.**—Where notice through the mails is relied on, it must clearly be shown, both in pleading and evidence, that the communication was placed in the post office,

¹ *Heffernan v. Supreme Council*,
40 Mo. App. 605.

³ 1 Ky. L. Rep. 93; Court of Appeals
of Kentucky.

² *Benedict v. Grand Lodge*, 48 Minn.
471; 51 N. W. Rep. 371.

properly directed, and stamped according to law.¹ Where such notice is relied on, it is not sufficient to show that three persons, members of the same family, were also members of the society, and that three notices were placed in one envelope, and directed to another of the three than the deceased.² Where the by-laws of a society provide for notice of assessments due, before there shall be a forfeiture of benefits, notice mailed to a member is not sufficient to sustain a forfeiture, without proof that it reached him.³ Where a party is entitled to notice, and has not stipulated to have it transmitted by mail or otherwise, he is not bound by any notice until it is actually received by him.⁴ Where the contract of insurance provides that a notice of assessment shall be transmitted by mail by the society to the member, a change of residence, not made known to the society, is without effect upon it. The society performs its duty when it sends a notice of assessment to the address of the member as made known to it, and the notice is complete on the mailing of it.⁵

Where the officers of a society testify that notices of a certain assessment were sent out as usual, and, that they presume that one was sent to a certain member who has since died, but they do not profess to remember as a fact that such a notice was sent to him, or to have any record of the fact to confirm an impression based simply on their ordinary course of proceeding, the liability to accidental omission in sending a large list of notices is too great to justify a court or jury in giving to such testimony sufficient weight to find therefrom that such notice had been sent, when it also appears from the evidence that all other notices sent by them had been, but that this one had certainly not been received by the deceased. Where it is

¹ *N. W. Association v. Schauss*, 148 Ill. 304; 35 N. E. Rep. 747; *Haskins v. Society*, 7 Ky. Law Rep. 371.

² *Garretson v. Equitable Mutual*, 74 Iowa 419; 38 N. W. Rep. 127; see *Garbutt v. Association*, 84 Iowa 293; 51 N. W. Rep. 148.

³ *McCorkle v. Association*, 71 Texas 149; 8 S. W. Rep. 516; *Supreme Lodge v. Dalberg*, 37 Ill. App. 145.

⁴ *McCorkle v. Association*, *supra*; *Durhans v. Corey*, 17 Mich. 282; *Cast-*

ner v. Farmers' Mutual, 50 Mich. 273; *Supreme Lodge v. Johnson*, 78 Ind. 210; *Merriman v. Association*, 138 N. Y. 116, 33 N. East. Rep. 738, affirming 18 N. Y. Supp. 305; *Shea v. Association*, 160 Mass. 289; 35 N. East. Rep. 855; *N. W. Association v. Schauss*, 148 Ill. 304; 35 N. East. Rep. 747.

⁵ *Lothrop v. Ins. Co.*, 2 Allen (Mass.) 82; *Forse v. Supreme Lodge*, 41 Mo. App. 107.

shown that all notices of assessments, except the one in question, reached their destination, and that it certainly did not, a presumption arises that no notice was sent, and this presumption is not overcome by general testimony of the ordinary course of proceeding in sending the notice from the office. But in such a case the jury must pass upon the question of notice.¹

¹ *Gunther v. Aid Association*, 40 La. Ann. 777; 5 Southern Rep. 65; *N. W. Association v. Schauss*, 148 Ill. 304; 35 N. East. Rep. 747; *Hastings v. Ins. Co.*, 138 N. Y. 473; 34 N. East. Rep. 289. In *Jackson v. N. W. Mutual Relief Association*, 78 Wis. 463, 47 N. W. Rep. 733, it was said: "The testimony that this package was never received by Mrs. Jackson or the plaintiff (her husband, Wm. T. Jackson) seems to have been quite positive. The fact that it was not received is strong evidence that it was not sent. The by-laws of the company required that such notices should be sent to the address of the insured as found upon the books; and the address in this case was Cordelia Jackson, care of William T. Jackson. The secretary of the company testified that it was his habit to send notices according to the address on the books, but that he had sometimes sent them addressed to the person in whose care they were required to be sent, if such person was the husband of the insured, to save time, and it appears that he had done so in some cases, and that he had sent notices relating to this insurance directly to the husband. The secretary was unable to testify how this notice was actually addressed, whether to Cordelia Jackson alone, to her in care of her husband, or to him alone. He had no recollection on the subject. There was no proof whatever that it was addressed to Cordelia Jackson, the only proper person to whom it

could have been lawfully sent. The entire absence of testimony that the notice was directed to Mrs. Jackson is as fatal to the notice as if it had not been sent at all. The testimony as to the depositing of the notice in the postoffice is presumptive, rather than positive. The secretary, by the aid of another, made out notices of the assessment, as he testified, to all members in good standing, and placed them in a cupboard. He afterward compared them with the list of such members. They were then placed in a trunk or box, and an agent of the company went with it as it was conveyed to the postoffice, and saw them delivered, and he then signed the list on the books, to indicate their delivery at the postoffice. No person was able to testify that this notice was one of those delivered, or that Cordelia Jackson was one of such members in good standing, from actual view or inspection. It may perhaps be presumed that she was one of such members; but against such presumption, is the fact, that she never received such notice. * *

* It follows, therefore, that, in making the list of members in good standing, it is at least possible that some of them may be omitted, by mistake or oversight, and that Cordelia Jackson, in this instance, might possibly have been omitted. Do not these facts overcome the presumption that she was one of the members in good standing to whom a notice was made out and sent? It is suffi-

The by-laws of a society provide that the secretary shall give notice of assessments and of annual dues, "sending all such notices by mail to the last given postoffice address of each member, which shall be considered a legal notice." In construing this by-law the court said: "It is quite clear that (the member) was bound by the by-laws and that the by-laws made the sending by mail a legal and sufficient notification whether in fact the notice was ever received or not. The conventional mode, if followed, would be just as valid and effective to fix the rights of the parties in the one event as the other. There is nothing of harshness or unfairness in these terms. The great mass of commercial and financial business of the country is done through the mail, and it is not an unreasonable condition that notice so sent should be considered duly served, and the parties having made this one of the conditions of their contract, should be required to abide by it."¹ Where the contract provides that notice of an assessment shall be sent by mail to each member at his last or usual place of residence or business, it is not sufficient to show merely that a notice was mailed to a member, but it must be made to appear either that the notice was properly addressed or that it was actually received by him.²

cient that it renders such fact uncertain, and the testimony unreliable and unsatisfactory. Both of these questions were taken from the jury. It is sufficient that the testimony was not so conclusive upon these questions as to warrant the court in instructing the jury that notice of said assessment had been given to Mrs. Jackson. In such a state of the evidence, the question of the notice was a very proper one to be submitted to the jury." *Wachtel v. Society*, 84 N. Y. 28; *Payn v. Society*, 17 Abb. N. C. 53; *Castner v. Ins. Co.*, 50 Mich. 273; 15 N. W. Rep. 452. In *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. Rep. 454, it was said: "The financier, whose duty it is to forward notices, could not and would not testify, positively and specifically, that he mailed a notice to

Backdahl, but he swore to sending notices of this particular assessment to all of the members of the lodge, as he supposed, and as he evidently intended to do, including notice to *Backdahl*, if he was not overlooked. From this the jury might find that notice was sent to *Backdahl*." *Skilbeck v. Garbeck*, 7 Q. B. 846; *Ward v. Londesborough*, 12 C. B. 252; 1 Greenl. Ev., § 40; 2 Whart. Ev., § 1330.

¹ *Union Mutual v. Miller*, 26 Ill. App. 230; *Forse v. Supreme Lodge*, 41 Mo. App. 107; *Benedict v. Grand Lodge*, 48 Minn. 471; 51 N. W. Rep. 371; *Reichenbach v. Ellerbe*, 115 Mo. 588.

² *Supreme Lodge v. Dalberg*, 37 Ill. App. 146; see 138 Ill. 508; 28 N. East. Rep. 785; *N. W. Association v. Schauss*, 148 Ill. 304; 35 N. East. Rep. 747.

§ 261. Depositing a letter in a postoffice properly addressed and stamped, is *prima facie* evidence, that it was received in due course of mail by the person to whom it was addressed. The presumption that it was received arises from the usual course of business and the probability that the officers of the government have done their duty. It is not a conclusive presumption of law, but a mere inference of fact, and when it is opposed by evidence that the letter was never received, it must be weighed with all the other circumstances of the case by the jury in determining whether the letter was actually received, and the burden of proving the receipt of the letter remains throughout upon the party who asserts it.¹ Where actual notice of a fact is required and the receipt of the notice is disputed, the court will not be justified in instructing the jury that the receipt of a letter containing the notice may be inferred from so mailing the letter, but the question whether or not the notice was in fact received should be submitted to the jury to be determined from all the evidence, both positive and circumstantial.² Where, in such a case, the evidence shows that the member was absent at the time the notice was mailed to his residence, any presumption of its receipt by him is rebutted.³

¹ Meyer v. Krohn, 114 Ill. 574; 2 N. East. Rep. 495; Eckerly v. Alcorn, 62 Miss. 228; Durringer v. Moschino, 92 Ind. 495; Briggs v. Hervey, 130 Mass. 186; Kenney v. Altwater, 77 Pa. St. 34; Austin v. Holland, 69 N. Y. 571; Rosenthal v. Walker, 111 U. S. 185; 4 Sup. Ct. Rep. 382; Wade, Notice, § 501; Wharton Ev. § 1323 and note; Benedict v. Grand Lodge, 48 Minn. 471; 51 N. W. Rep. 371.

² Huntley v. Whittier, 105 Mass. 391; Home Ins. Co. v. Marple, 1 Ind. App. 411; 27 N. East. Rep. 633. A statement made by the writer of a letter while writing it is not admissible as a part of the *res geste* in proof of the sending of the letter and the giving of notice. Home Ins. Co. v. Marple, *supra*.

³ People v. Association, 8 N. Y. Supp. 675.

The laws of New York provide: premium. Such notice shall further

Where the only proof of service of notice is that a notice was found among the papers of the deceased just after his death and several days after the assessment was levied, there is no presumption that the notice was mailed on the day of its date, or that the envelope was properly addressed, or that the letter reached the member in due course of mail.¹

§ 262. **Date of notice given by mail.**—In *Protection Life Ins. Co. v. Palmer, Adm'r*,² one of the questions was as to the proper construction to be given to a clause in the contract of insurance, providing that the assured should, within thirty days from date of notice, pay to the company the assessment, and that a failure to do so should render the policy null and void. The evidence showed that a notice of an assessment was dated January 25, 1873, and it was mailed to the assured on February 3, 1873, but there was no evidence showing that he had ever received it. He died on March 5, 1873, without having paid the assessment. The company contended that the foregoing clause of the contract of insurance meant that the payment should be made within thirty days from the date written on the paper as a date. But the court held, that the true object of the agreement was that the assured should be informed that an assessment had been made, which he was required to pay by the terms of his agreement; that the insurance company undertook and agreed that they would convey to him information of the fact that he had been assessed and the amount imposed, and that he agreed that, after they should put him in possession of the fact, he would pay the amount within thirty days. And the court further held that the time

state that, unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy, and all payments thereon, will become forfeited and void." It was insisted in *Merriman v. Association*, 138 N. Y. 116, 33 N. East. Rep. 738, that this act applied to mutual benefit societies; but it was held that it clearly had reference only to policies where premiums or inter-

est become payable only at stated times and that the purpose of the act is to require notice to be given so that policies may not lapse through forgetfulness or misapprehension. Assessments in mutual benefit insurance are uncertain in amount and time of payment and can only become due after notice and demand. Hence they are not within the purpose of the act.

¹ *Phelan v. Ins. Co.*, 113 N. Y. 147; reversing 42 Hun 419.

² 81 Ill. 88.

within which payment is to be made is not to be computed from the actual date of the notice, or from the day it was mailed to the member, but, when sent by mail, from the time at which the notice would, in the regular mode of carrying the mail, be received by the member during business hours. The company was held liable on the policy. In discussing the questions involved in the case of *The National Mutual v. Miller*,¹ the court of appeals of Kentucky recognize this to be the true rule in determining the date of notice of assessments in like cases. Where the contract requires that payment shall be made within a certain time "from the date of the notice" of assessment, this does not mean the date written in the notice, but the date when the giving of notice is complete under the contract.² Where a contract provides that notice of an assessment "may be served either personally or by registered letter addressed to the assured at his postoffice address named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served," service is complete and the thirty days begin to run as soon as the letter is mailed as provided.³ Where an assessment is payable within thirty days from the "mailing of a registered letter to the member, containing a notice of such assessment," the period of time does not run from the date when the letter was deposited in the postoffice to be mailed and registered, but from the date when the registration was completed by making the proper entries in the books of the postoffice, and the procuring of a receipt by the sender, as provided in the postal regulations.⁴ A by-law of a society provides that a policy issued by it shall become void "if the assured shall neglect, for the term of thirty days, to pay * * any assessment * * when requested to do so by mail or otherwise." In construing this by-law, the court held that, by the neglect of the assured to pay the amount of an assessment for thirty days after a written request for payment, prepaid, duly directed and deposited by the society in

¹ 85 Ky. 88; 2 S. W. Rep. 900; see *N. W. Rep.* 47; *Elliott v. Kennedy*, *Mueller v. U. S. Association*, 51 Ill. 26 *How. Pr.* 422; *Forse v. Supreme Lodge*, 41 Mo. App. 107.

² *Ill. Order v. Besterfield*, 37 Ill. App. 522. ⁴ *Hollbrook v. Ins. Co.*, 86 Iowa 255; 53 N. W. Rep. 229.

³ *Ross v. Ins. Co.*, 83 Iowa, 586; 50

the postoffice, would, in due course of mail, reach the place of his residence as set forth in the policy, the contract was forfeited and rendered void, and that such neglect to pay worked a forfeiture of the policy whether he received such request or not.¹ A by-law of a society provided that, whenever any assessment should be levied, and notice thereof be forwarded to the insured by mail or otherwise, and the insured should for the space of thirty days after such notice refuse or neglect to pay the same, the policy might be declared void. In construing this by-law, the court said: "In contemplation of law the plaintiff had notice, when in the ordinary course of mail the notice should have reached (the member's postoffice address). It would greatly embarrass the defendant, if not render the transaction of its business impracticable, if it should be required to prove actual delivery of notice to the party assessed. By express stipulation it is agreed that the policy may be forfeited for refusal or neglect to pay an assessment within thirty days after notice thereof forwarded to the insured by mail. In mailing the notice the company did all it was required to do."² A certificate of membership provided that the member should be notified of each assessment "by written notice deposited in the postoffice in the city of New Orleans, addressed to such address as has been left in writing at the office of the association with the secretary," and that "on his failure to pay said assessment within thirty days from the time that notice is given to him that said assessment is due, this policy shall become null and void." A notice in writing deposited in the postoffice in New Orleans addressed to such address as has been left, etc., is a sufficient notice of assessment, and no evidence will be admitted to show that the member did not receive the notice.³ Where the contract provides for notice of an assessment by mail to the last given address of the member and for forfeiture for non-payment within a certain time, the date of the notice is the time when it is received by him, or the time when he could have received it in the ordinary course of mail.⁴

¹ Lothrop v. Greenfield Mutual, 2 Ann. 938; see also Yoe v. Association, Allen (84 Mass.) 82. 63 Md. 86.

² Greely v. Iowa State Ins. Co., 50 4 U. S. Association v. Mueller (Ill.), Iowa 86; Mutual Reserve v. Hamlin, 37 N. East. Rep. 882; Mueller v. U. 139 U. S. 297; 11 Sup. Ct. Rep. 614. S. Association, 51 Ill. App. 40.

³ Epstein v. Mutual Aid, 28 La.

§ 263. **Date of assessment, date of notice.**—A by-law of an association provided that “every member failing to pay his assessment, within thirty days from the date of such assessment, shall stand suspended.” In construing this by-law, the appellate court of Illinois held that the duty of the association was complete upon mailing the assessment, and that the failure of such assessment to reach the assured, by reason of its miscarriage in the mail, or the absence of the assured, would not excuse the non-payment of the assessment within the prescribed time. The court said: “In the case of *Protection Life Ins. Co. v. Palmer*,¹ where the policy is declared by its terms to be forfeited unless payment is made within thirty days from the date of notice, it is not unreasonable to hold that these words ‘*date of notice*’ refer to the time when the knowledge of the facts contained in the letter reach the assured, for the word ‘notice’ has a double meaning, and is often used to signify either the paper or other instrumentality used to give information, or the information itself. No such ambiguity can arise by the use of the word ‘assessment.’ It can not refer to two distinct periods. The date of the assessment means necessarily the time when it is made out by the secretary and mailed to the assured in accordance with the terms of the by-laws.”²

§ 264. **Notice by publication.**—A contract of insurance provided that the society should notify its members of assessments by publication for five days in certain newspapers, and that the members should pay the assessments within thirty days after notification. The court held that under this contract the member was allowed the entire thirty days, commencing and counting from and after the last five days of publication, and that the society could not claim the forfeiture of the policy for non-payment of assessment until thirty days after the last of the five days of publication had expired.³ Under a clause in the charter of a society, directing the managers when they make an assessment to “publish the same,” and providing that the member shall “within sixty days after such

¹ 81 Ill. 88.

W. Life Ass'n, 36 Fed. Rep. 75; Yoe

² *Weakly v. N. W. Association*, 19 Ill. App. 327; see *Greely v. Iowa St. Ins. Co.*, *supra*; *Epstein v. Mutual Aid*, etc., *supra*; *Stanley v. N.*

Association, 63 Md. 86; *Mueller v. U. S. Association*, 51 Ill. App. 40.

³ *Wetmore v. Mutual Aid & Ben.*, 23 La. Annual 770.

publication" pay their assessments on penalty of immediate forfeiture, actual notice of assessment to each member is not required, but notice by publication is sufficient.¹ Where the articles of association provide that members shall pay their assessments "within thirty days after receiving notice thereof," on penalty of forfeiture for non-payment thereof within that time, the society must show, before a forfeiture may be declared, that actual notice was given to the member, though a by-law provides that notice of assessments "shall be given by publication in one or more newspapers." That construction is to be given to inconsistent terms which is most favorable to the rights of the member.²

§ 265. **Notice of date of payment.**—A society sent out the following notice to its members: "Mortuary assessment No. 30 will be due and payable on or before the first day of May, 1872." Without having paid that assessment, the insured died on the night of May 1, 1872, before midnight. There was nothing in the contract providing at what hour the assessment should be paid, and no provision, as is generally the case in insurance contracts, that the policy should cease at noon on the day named, if the assessment should not be paid. The court held that the policy continued in force until midnight of May 1st, and that the society was liable.³ Where a member is to make payment of an assessment within thirty days from date of notice thereof, the day on which he receives the notice will be excluded.⁴

§ 266. **Service of notice.**—In suits upon certificates of membership in a mutual benefit society, the controversy frequently turns upon the question whether the deceased member was so notified or informed of the assessment as to incur a forfeiture by reason of its non-payment. The notice given, in order to have such an effect, must be shown to have substantially followed, in its form and manner of service, the rules prescribed in the contract of insurance. It is often insisted, however, that it is sufficient if it appear from the evi-

¹ Pennsylvania, etc. v. Ins. Co., 127 Pa. St. 559; 18 Atl. Rep. 392; Northampton Ins. Co. v. Stewart, 39 N. J. L. 486.

² Schmidt v. German Mutual, 4 Ind. App. 340; 30 N. East. Rep. 939.

³ Och v. Homestead, etc., Ins. Co., 4 Pittsburg Leg. Jour. 98.

⁴ Protection Life v. Palmer, 81 Ill. 88; National Mutual v. Miller, 85 Ky. 88; 2 S. W. Rep. 900; Wetmore v. Mutual Aid, 23 La. Ann. 770.

dence that the deceased member had knowledge of the assessment, derived from any source, or that he had such a knowledge as should have put him upon inquiry about it. This doctrine is not tenable. In discussing this question, the court of appeals of the State of Missouri said: "There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon inquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by a notice given in any other form or manner. Thus, when a man's rights are to be adjudicated in a court of justice, he is entitled to just the form, manner and time of notice that are directed by the statute; otherwise he will not be bound by the proceedings, although bodily present in the court room, seeing and hearing all that may be done. The indorser of a promissory note may have personal knowledge of the maker's intention not to pay, or of his failure to pay, at maturity. Yet the holder can not subject him to any liability without a notice of the dishonor, given in the form, time, and manner established by commercial law and usage. (The member) might have heard a rumor, or have been informed by a friend, that assessment number 72 had been declared, and must be paid by a certain time. But she had a right to disbelieve the rumor, or the friend, until a knowledge of the fact was brought home to her in the way for which she had stipulated in her contract with the association."¹

Where it is shown that a deceased member of such a society knew of the assessment made upon the members, and expressed his intention to pay it, these are facts from which the jury may, but are not bound to infer that he was properly notified.² The object of stipulations as to the form and manner of service of notice of assessment is to point out to the member the way in which he is to expect the notice, and to protect him in his right to have knowledge and information of the time when, and amount which, he will be required to pay. The member

¹Siebert v. Chosen Friends, 23 Mo. App. 268. Stewart v. Supreme Council, 36 Mo. App. 319.

²Siebert v. Chosen Friends, *supra*;

may waive compliance with these purely technical requirements, and if he actually receives, without objection, the notice to which he is entitled, and acknowledges the receipt of the notice, or in any way acts upon it, but does not pay the assessment, he waives the right to service in the manner and form as agreed upon in the contract. A by-law of a society provided: "If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing has been left at his last and usual place of abode or business, to pay an assessment, the risk of the company on the policy shall be suspended until the same is paid." A member was not personally called on for an assessment, and a notice in writing was not left at his last and usual place of abode or business, but he received a notice by mail, and had some correspondence with the society about the assessment. He did not pay the assessment, but made no objection to the way in which the notice reached him. In an action on the contract of insurance, it was held that any objection to the manner of receiving the notice had been waived by the member.¹ Upon this subject, the court said: "The object of this provision in the by-law is to bring the notice of an assessment to the knowledge of the insured. But this may be waived, and it does not preclude other methods of communication, provided the purpose of the by-law in this regard is accomplished. The objection now for the first time made is purely technical, and as he actually received the notice to which he was entitled, without objection, he has been in no way injured by this departure from the by-law, and he can not avail himself of it."

From the authorities the doctrine is fairly deducible, that a member does not, by receiving and retaining a notice of an assessment, waive any objection to its sufficiency under the contract of insurance; but that he does waive the question as to the sufficiency of the service of a proper notice upon him, by receiving it by some other method of communication than that agreed upon, acting upon it, and retaining it beyond a time when he might reasonably call the attention of the society to the irregularity and insufficiency of the service. When the evidence is conflicting concerning the service of notice upon a member, it is for the jury to decide whether or not such service

¹ Hollister v. Quincy Insurance Co., 118 Mass. 478.

was made upon him.¹ Proof of the service or the giving of a notice involves proof of its contents.² Where a particular method of giving the notice of an assessment has been agreed upon and made a part of the contract, it is binding upon all parties unless waived.³ Where a law or contract provides that notice of any fact shall be given and there is no qualification, personal service is meant. In the absence of any agreement with the member, or any provision in the charter or by-laws for a different mode of service, it should be made personally, as required at common law, when the object is to deprive a party of his rights or property; but if that method be dispensed with, then the service must be made in such a way as will most likely effect the object of the notice.⁴ Unless some special mode or form of notice be required by the contract, personal service will be sufficient;⁵ and where by the contract payment must be made within thirty days after notice of an assessment has been published, personal service of notice of an assessment is sufficient.⁶

§ 267. **Agreement of the society to give notice to the beneficiary.**—Where the society knows that a person has an expectant interest in the fund to be paid under a certificate, and agrees to give him notice of assessments in time to enable him to pay them and prevent a forfeiture, and afterward fails to give him notice, it can not ignore the agreement and forfeit the contract in violation of it.⁷

§ 268. **Insufficient notice of assessment.**—The notice must conform to the by-laws and the contract, or it is invalid. No forfeiture can be declared for non-payment of an assessment where the notice is insufficient. Where the contract of insurance provides that the member shall pay \$2.50 quarterly for expenses, and that he shall forfeit his membership if the quarterly dues shall not be paid within thirty days after notice, a notice to pay \$10 as annual dues, in advance, is

¹ Buckley v. Columbia Ins. Co., 83 Pa. St. 298. County Mutual v. Knight, 48 Me. 75; Williams v. German Mutual, 68 Ill.

² Supreme Lodge v. Johnson, 78 Ind. 110; 11 Ins. L. J. 251.

⁶ Jones v. Sisson, *supra*.

³ Maginnis v. Association, 43 La. Ann. 1136; 10 So. Rep. 180.

⁷ Keeler v. Association, 20 N. Y. Supp. 935; Kenyon v. Association,

⁴ Wachtel v. Society, 84 N. Y. 28. 122 N. Y. 247; 25 N. East. Rep. 299;

⁵ Jones v. Sisson, 6 Gray 288; York 2 May. Ins. (3rd Ed.) § 360, C.

nota sufficient notice.¹ Where the charter and by-laws of a society provide that, when the board of directors shall order an assessment, the secretary shall prepare it, and that it shall be signed by him and a majority of the board, an unsigned and uncertified paper containing no headings to explain the figures set down in it, can not be treated as an official assessment for the purpose of forfeiting the policy of one who had not paid the amount of his assessment until after the expiration of the period fixed by that notice to him.² The articles of incorporation and by-laws of a mutual benefit society required that assessments be made by the secretary, and the certificates of membership provided that assessments should be payable within thirty days after notice from the secretary. It was held that the notice contemplated was notice of the assessment; and that the certificate was not forfeited by neglect to pay assessments which were not imposed by the secretary, but by persons claiming to be managers, and where the only notice from the secretary was a notice of forfeiture.³

The by-laws of a society provided that, upon the death of a member, the secretary should notify the members through local agents, and that each member should within ten days thereafter pay his dues, and if he should neglect to do so for forty days, he should forfeit his membership. The court in construing this by-law held that it would be unjust and unreasonable to hold the mere notice to the local agents as notice to members, and that the provision must be construed to mean that, the local agents being notified, they must notify the members within ten days thereafter, and, upon receipt of such notice, the members for the first time become legally bound to pay the assessments, and must pay within forty days.⁴ Where a notice shows that the assessment was levied by the society, instead of by the board of directors, the notice is sufficient, as, in legal effect, it is the same thing.⁵ A notice which contained only a *fac simile* of the seal of the lodge, was held

¹ Mutual Endowment v. Essender, 59 Md. 463.

² Baker v. Citizens Mutual, 51 Mich. 243.

³ Bates v. Detroit Mutual, 51 Mich. 587.

⁴ Coyle v. Ky. Grangers (Ky.), 2 S. W. Rep. 676; District Grand Lodge v. Cohn, 20 Ill. App. 335.

⁵ Williams v. German Mutual, 68 Ill. 289.

sufficient notice of assessment, where it did not appear that the laws of the society required an impress seal mark to be placed upon the notice. Defects of form merely are not material, where the notice gives to the member actual information of the assessment.¹ A notice to do an act, which is required to be given by a particular person named, contemplates the personal action and judgment of the person authorized to give such notice, and involves the exercise of power and discretion to be exerted by the individual himself, which he can not delegate to another. Thus, where a by-law of a mutual benefit society provides that the local secretary shall give notice of assessments to members, and another by-law declares that a member, by a failure to pay after notice by the general secretary shall forfeit his right to benefits, a member is entitled to notice from both secretaries, and a card on which the name of the general secretary is printed, but which is filled up and addressed by the local secretary, is not sufficient to constitute a notice from the general secretary.²

When according to the by-laws of a society, the notice to members requiring them to pay assessments must contain a list of all deaths which have occurred since the last assessment, and notify the member of the amount due from him to the benefit fund, a forfeiture of membership can not be sustained for failure to pay an assessment, when the notice thereof did not conform to the by-laws in these respects.³ Where provision is made for the publication of a list of the deaths, it will be presumed that the members adopted such a provision in order to see the necessity of the assessment; and where the society agrees to notify the member of the amount due from him on an assessment, he has a right to rely upon the amount as stated in the notice, and where no amount is stated the notice is manifestly insufficient. The fact that a notice of assessment was not addressed on its face to a member does not invalidate it, when it was sent and received in an envelope properly directed. A notice need not state the amount of the

¹ Karcher v. Supreme Lodge, 137 Mass. 36; see Hefferman v. Supreme Council, 40 Mo. App. 605; Hansen v. Supreme Lodge, 140 Ill. 301; 29 N. East. Rep. 1121; S. C., 40 Ill. App. 216.

² Payne v. Mutual Relief Society, 17 Abb. (N. Y.) N. Cas. 53.

³ Miner v. Michigan Mutual, 63 Mich. 338; 29 N. W. Rep. 852.

assessment when the member knows the amount which he is required to pay under his contract.¹

A society claimed that a member had been suspended after having received notice under an article of its by-laws, which was as follows: "A member who does not pay his dues and assessments to the lodge within four weeks after the quarter, shall be notified to pay the same within fourteen days, and if he does not pay he shall be considered in arrears, and he is not entitled to lodge benefits. A member so in arrears shall be notified by the secretary in writing to pay within thirty days, in default whereof the member shall be suspended." The dues, as to which the member was delinquent, were for the two quarters ending respectively June 30 and September 30. The only notice sent to the member in relation to the dues for the quarter ending June 30, as shown by the record, was mailed to him May 22, which was long before those dues were payable. The only other notice shown to have been sent him in relation to the dues of either quarter was mailed October 22, and that notice required the payment of the dues of both quarters. It was not shown, as to the dues of either quarter, that after the member had failed to make payment within four weeks after the quarter, he was notified to pay within fourteen days, and failing to make payment within that time, reached that stage of the proceedings where he could be "considered in arrears," and after becoming so "in arrears," he was again notified to pay within thirty days, and made default in payment during all that period. By the terms of the above by-law, each of these steps was clearly essential to valid suspension. "It was necessary to wait four weeks after the expiration of the quarter, and then if the dues were unpaid, to notify the delinquent to pay within fourteen days. If he still remained delinquent, he was to be considered in arrears, and when so in arrears, he was to be again notified to pay within thirty days thereafter, and it was only when the delinquency had extended to the termination of this latter period, that sentence of suspension could be pronounced." ²

§ 269. By a clause of the certificate of membership, a forfeiture was authorized if the member failed to pay an assess-

¹ Hansen v. Supreme Lodge, 40 Ill. App. 216.

² District Grand Lodge v. Cohn, 20 Ill. App. 335.

ment within thirty days after a publication of the notice for five consecutive days. Subsequent to the issuing of the certificate, the society addressed a notice of assessment to the insured, who resided in New Orleans, on which the following indorsement was printed: "Members residing in the city of New Orleans are hereby notified that the notices of assessments due by them on death of a member are only given through newspaper publication—in special notice column—for eight consecutive days; being always published on the first Sunday of the month and continued through the week, including the second Sunday. Payment is required at the office within thirty days from date of publication; the failure to make payment within thirty days operates a forfeiture of his or her policy, and the name of such delinquent will be erased from the books of said association. Notices of assessments are published in the *New Orleans Times*, *New Orleans Bee*, the *Daily Picayune* and *German Gazette*. Special notices will not be sent to residence or business location." While this indorsement remained unrecalled, it was a voluntary extension of the time of the publication, in order to effect a forfeiture as agreed to in the contract of insurance; and under this agreement the forfeiture would not occur unless there was a failure to pay the assessment called for, after thirty days from the publication of notice for eight consecutive days. Where the notice, therefore, under which forfeiture was claimed was only published for seven days, it was held insufficient.¹

A society provided in its by-laws that if a member should fail to pay his assessment for ten days after notice thereof by publication, his wife should have no benefit fund in case of his death; and if he should fail for thirty days so to pay, he might be expelled. A by-law of the society provided for publishing notice of every death and assessment, and of the time when the same was required to be paid, and also provided that a collector should be appointed to notify members in arrears for such dues, and to collect them. A member died in

¹ *Fitzpatrick v. Mutual Benevolent Ins. Co. v. Stewart*, 39 N. J. L. 486; *Co.*, 25 La. Ann. 443; see *Gunther v. Atlantic Mutual v. Sanders*, 36 N. Aid Ass'n, 40 La. Ann. 777; 5 South- H. 254.
ern Rep. 65; see also *Northampton*

April, 1873, and notice was published in two newspapers in the city where the members resided, stating the fact, and that dues on account thereof were payable April 30, 1873. B., another member, was drowned on May 11, 1873. There was no evidence that he was aware of the death of the member who died in April, or that he knew of the publication of notice in the newspapers. The collector of the society did not call upon him for, or notify him of the assessment. The society refused to pay the benefit fund to B.'s widow. The court held that members of this society did not bind themselves to ascertain the fact of the death of a member from publication only at the risk of forfeiting their interest in the benefit fund, and that B. did not lose his right to have this fund paid to his widow, as he had no knowledge of the death of the party on whose account he had been assessed, or of the publications in the newspaper; and until he had, or until after demand made upon him by such collector, his right to pay such assessment and preserve his rights in the fund continued.¹ Notice of an assessment handed to a son of the member is insufficient as a basis for a declaration of forfeiture.² Where the by-laws provide that notices of assessment shall be given by publication in *three* newspapers published in the county in which the society is doing business, it is not sufficient to show that such notices were published in *two* papers in that county.³ A notice of an assessment is invalid, which requires payment to be made before the expiration of the time in which the member may, by the contract, make the payment.⁴ Thus where

¹ Mutual Relief Society v. Billau (Superior Court of Cincinnati), 3 Am. Law Record, 546; Schmidt v. German Mutual, 4 Ind. App. 340; 30 N. East. Rep. 939.

² Supreme Lodge v. Wickser, 72 Texas, 257.

³ Sande v. Groves, 58 N. Y. 94.

⁴ Frey v. Wellington Mutual, 4 Upper Canada, 293. In this case it is said: "The statute provides that an assessment shall become payable in thirty days after notice of such assessment shall be mailed to the person who has given the premium note

directed to his postoffice address, as given in his original application, or in writing to the secretary of the company. On the 12th of February the notice on which the defendants rely was mailed, but it required payment to be made on the 24th of the same month. The statute requires the time for payment to be stated in the notice, and so impliedly requires the named day to be at least thirty days subsequent to the mailing. This assessment, therefore, does not seem to have been validly made upon the plaintiff."

the by-laws of a society provide that, upon the failure of a member to pay his assessment within *forty* days after notice from the secretary of the death of a member, his claims upon the society shall be forfeited, a notice from the secretary requiring payment to be made within *thirty* days is a nullity, as there is no authority for the issuing of such a notice.¹ Where the by-laws provide for forfeiture of membership if the member fails to pay any assessment "within thirty days from the date of the notice thereof," a notice which is mailed so as to reach the insured November 30, and which demands payment on or before December 28, is not sufficient to sustain a forfeiture, since the "date" of the notice is the time when it is or could be received.² Where a mutual benefit society urges its members to deposit money with it in advance of the assessments, and agrees to apply such deposits to the payment of future assessments, a notice demanding three dollars from a member, that being the full amount of the assessment, when the member has one dollar deposited with the society, is invalid as demanding more than is due.³ A notice requiring a member to pay an assessment before it is due is invalid.⁴

¹ Haskins v. Ky. Grangers' Mutual, *supra*; Eddy v. Ins. Co., 65 N. H. 7 Ky. Law Rep. 371. 27; 18 Atl. Rep. 89.

² U. S. Association v. Mueller (Ill.), 37 N. East. Rep. 882; Mueller v. U. S. Association, 51 Ill. App. 40. ⁴ Haskins v. Ky. Grange, 7 Ky. Law Rep. 371; Frey v. Wellington Mutual, *supra*.

³ U. S. Association v. Mueller,

CHAPTER XIX.

ASSESSMENTS.

- § 270. Payment of assessment.
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- 272. By whom payment of an assessment may be made.
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§ 270. **Payment of assessment.**—Where a policy of insurance issued by a mutual benefit society provides that, if any assessment owing by the assured shall not be received by the society within thirty days from the date of notice, the policy shall be null and void, and there is no provision either in the contract of insurance or in the notice, stipulating the mode of remitting the assessment, the member is bound to see that the money is actually received by the society within the time specified, or forfeit his policy. But where a notice directs the member to remit the amount by post-office order, or draft payable to the society, the right to forfeit the policy, by reason of the non-payment of the assessment within the time limited by the policy, is waived, and all that the member can be expected to do, under such circumstances, is to promptly observe such directions. When he has done so, he has a right to suppose that his dues are paid, and he can not be expected to know to the contrary until notified by the society, or until the

lapse of a reasonable time to receive a notice from the society.¹ In all cases where, by the direction or agreement of the creditor, money is sent by mail in discharge of a debt, proof that a letter, containing the requisite sum, duly sealed and directed, was deposited in the post-office, is sufficient to maintain a plea of payment.² This doctrine rests on the principle that the debtor has done all in his power to perform the contract, and that the risk of transmission was assumed by the creditor. An assessment is considered paid to the society when, according to instructions, it is delivered to an express company addressed to the society or its agent.³

The contract of insurance frequently provides that assessments shall be paid by noon of the day on which they fall due, but, in the absence of any provision upon the subject, an assessment may be paid at or before midnight of the day it falls due; and if paid by that hour, even after the death of the member, it will be sufficient.⁴ The decision of the officers of a society respecting the construction to be given to a contract of insurance, and the custom of paying assessments which has arisen under such decision, are not binding upon members. Where the contract provides for the payment of assessments to an officer of the society, and those in authority in the order decide that they must be paid at a meeting of the lodge, and can not be paid otherwise, and a custom of so paying them grows up in the order, the terms of the express contract of the parties, and not the custom or habitual mode of doing business, must determine the rights and duties created by that contract.⁵ It may well be doubted whether it is competent for those representing a mutual benefit society to accept anything less than the total amount of the assessment laid upon a member, or to accept in payment thereof anything but

¹ *Protection Life v. Foote*, 79 Ill. 361; see *Palmer v. Phoenix Mutual*, 84 N. Y. 64-71. ⁴ *Och v. Ins. Co.*, 4 Pittsburg Leg. Jour. 98; see *Leigh v. Ins. Co.*, 26 La. Ann. 436.

² *Warwicke v. Noakes*, 1 Peake R. 67; *Hawkins v. Rutt*, *Ib.* 186; *Kington v. Kington*, 11 M. & W. 223; *Calvin v. Association*, 21 N. Y. Supp. 734; *Primeau v. Association*, 28 N. Y. Supp. 794. ⁵ *Manson v. Grand Lodge*, 30 Minn. 509; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Davidson v. Supreme Lodge*, 22 Mo. App. 263; see

³ *Whitley v. Ins. Co.*, 71 N. C. 480; *Currier v. Ins. Co.*, 53 N. H. 538.

money. If this course of dealing might be carried on with one member, it might also be done with all members, and thus the sole purpose of such an organization might be hindered and defeated.¹ In some contracts payment in cash is not called for in apt words, and in such cases anything which can fairly be called payment, and which is accepted as such, will answer the requirements of the contracts, but where an assessment must be "actually paid in cash," nothing else will answer the requirement.²

A general agent may waive the payment of an assessment in cash, and accept other things than money in payment;³ but a local agent may not.⁴ Where the treasurer of a subordinate council remitted to the supreme treasurer of the society an amount which equaled, and was received as, the aggregate amount due from his council for each member thereof, and the remittance included the amount assessed against him, the fact that the payment of his assessment was made by him directly to the supreme treasurer, instead of indirectly through the collector, as provided by the rules of the council, may not be urged to deprive his widow of the benefit of such payment. The main purpose for such rules for the collection of assessments is to put into the hands of the supreme treasurer the amount payable by each member of the society. If the money gets into the treasury, it matters little by what path it got there, so far as the rights of the beneficiary are concerned.⁵ Payment may be made in anything of value agreed upon by

¹ *Protection Life Ins. Co. v. Foote*, 51 Texas 79; *Ill. 361*; *Buffum v. Fayette Mut. Ins. Co.*, 14 N. Y. St. Ins. Co., 3 Allen (Mass.), 360; *Hoffman v. John Hancock Mutual*, 92 U. S. 161; *Texas Mutual v. Davidge*, 51 Texas 79; *Ill. 361*; *Buffum v. Fayette Mut. Ins. Co.*, 14 N. Y. St. Ins. Co., 3 Allen (Mass.), 360; *Hoffman v. John Hancock Mutual*, 92 U. S. 161; *Rept'r 573*; as to payment by check, see *Neil v. Ins. Co.*, 7 Ont. App. 171; *Bigelow v. Association*, 15 N. Y.

² *Dunham v. Morse*, 158 Mass. 132; *Weekly Dig. 261*. As to waiver of actual prepayment of premium or assessments, see *Boehen v. Ins. Co.*, 32 N. East. Rep. 1116.

³ *Bouton v. Ins. Co.*, 25 Conn. 542; *Sheldon v. Ins. Co.*, 25 Conn. 207; *Kentucky Mutual v. Jenks*, 5 Ind. 96; *Willcuts v. Ins. Co.*, 81 Ind. 300; *Insurance Co. v. Colt*, 20 Wall. 560; *35 N. Y. 131*; *Goit v. Ins. Co.*, 25 Barb. 189; *Sheldon v. Ins. Co.*, 26 N. Y. 460; *Baxter v. Ins. Co.*, 13 Allen 320; *Heaton v. Ins. Co.*, 7 R. I. 502;

⁴ *Continental Life v. Willets*, 24 Mich. 268; *Combs v. Ins. Co.*, 65 Me. 382; *Hoffman v. Ins. Co.*, 92 U. S. 161; *Carter v. Ins. Co.*, 56 Ga. 237; *Farrie v. Supreme Council*, 15 N. Y. St. Reporter 155.

the parties. Payment of an assessment by a draft which was paid when presented is valid, although the rules of the society forbade the taking of drafts.¹ Where a member gave an order on a third person for the amount of an assessment, and the society failed to present the order for payment prior to the death of the member, although several months intervened, the society was estopped to set up the non-payment of the assessment.² To pay the membership fee and premium in advance in an accident company, an order was given by an ignorant man upon his employer, directing payment to be made from his wages. The company was informed by the man of the nature of his employment, and the uncertainty of his earning wages. The order was afterward returned to the company with the statement that the man had left the service of the drawee and had been paid in full. No notice of non-payment was given to the drawer of the order, and no further effort was made to collect the premium. Thirteen days after the order was returned the man was accidentally injured. It was held that under all the circumstances of the case, including the delay in the effort to collect the order, and the failure to inform the drawer that the taking of the order was not to operate as a complete discharge of his obligation to pay, he was entitled to notice of demand and nonpayment, and that the company could not insist that the policy had been forfeited.³ A society may waive a cash payment and accept in lieu thereof an order given by the member on a third person. When it does so, and gives a receipt for the amount, it can not defeat a recovery upon the policy and insist upon a forfeiture, without having given the assured notice of non-payment of the order.⁴ Where a society and

¹ *Piedmont Ins. Co. v. Ray*, 50 Texas 511.

² *Cotten v. Casualty Co.*, 41 Fed. Rep. 506.

³ *Eury v. Ins. Co.*, 89 Tenn. 427; 14 S. W. Rep. 929; but see *Landis v. Ins. Co.*, 6 Ind. App. 502; 33 N. East. Rep. 989; *McMahon v. Ins. Co.*, 77 Iowa, 229; 42 N. W. Rep. 179; *Bane v. Ins. Co.*, 85 Ky. 677; see *Pacific Mutual v. Williams*, 79 Texas, 633; 15 S. W. Rep. 478.

⁴ *National Benefit Ass'n v. Jackson*, 114 Ill. 533; 2 N. East. Rep. 414; see

Lyon v. Ins. Co., 55 Mich. 141; 20 N. W. Rep. 829; *Baker v. Ins. Co.*, 6 Abb. Pr. (N. S.) 144; 1 Big. L. & A. Cas. 595; *Bane v. Ins. Co.*, 85 Ky. 677; see *Knickerbocker Ins. Co. v. Pendleton*, 112 U. S. 697; *Insurance Co. v. Ray*, 50 Texas 511; *Kline v. Association*, 111 Ind. 462; 11 N. East. Rep. 620.

its agent keep running accounts with each other, and the society agrees to charge him in its account against him, with assessments as they become payable, this promise is valid although its by-laws provide for the payment of assessments in cash.¹ But where the society merely charges its local agent with the assessment about to become due from a third person, this does not constitute in judgment of law a payment of the assessment.²

The beneficiary of a member is not entitled to a proportionate part of the amount of insurance, when only a part of the assessment has been paid, in contravention of a condition of the contract, that if the assessment is not paid by a certain time the insurance shall cease.³ Payment of part of an assessment does not, by itself, raise a presumption that there was an understanding that time was to be given for the payment of the remainder.⁴ Where there is nothing in the contract requiring the monthly dues to be paid in advance, they may be paid at any time during the month, and a member who dies before the end of a month without paying dues for that month is not in arrears.⁵

§ 271. Payment out of funds in the hands of the society.—

It has been held that a society which has money in its possession belonging to a member, and the power to so apply it, must pay out of such money an assessment due from the member, to save a forfeiture of the contract; and it is not necessary in such a case that the member shall authorize the society to so appropriate the money. It is inequitable and against the policy of the law to permit a society to forfeit a contract of insurance for non-payment of an assessment, when it has in its possession the money of the member to an amount covering the assessment, and has the power to apply the money as a

¹ *Missouri Valley Life Ins. Co. v. Hollister v. Ins. Co.*, 118 Mass. 478; *Dunklee*, 16 Kan. 158; see *Butler v. Mutson v. Ins. Co.*, 28 N. J. Eq. 167; *Ins. Co.*, 42 N. Y. Sup'r Ct. 342; *Matter of Booth*, 11 Abb. N. C. 145; *East. Rep.* 53; *Bulger v. Ins. Co.*, 63 Chickering v. Ins. Co., 116 Mass. 321; Ga. 328.

Marsh v. Ins. Co., 3 Biss. 351.

⁴ *Continental Life v. Willets*, 24

² *Wright v. Society*, 41 N. Y. Sup'r Mich. 268.

Ct. Repts. 1; see *Brown v. Ins. Co.*, 59 N. H. 298.

³ *Weiss v. Tennant*, 21 N. Y. Supp. 252.

⁵ *Willcuts v. Ins. Co.*, 81 Ind. 300;

payment.¹ Where a society had, under an illegal by-law, retained sick benefits due a member to an amount largely in excess of an assessment on the contract of insurance, it was held that such an assessment should have been paid out of the money so retained, and that a forfeiture for non-payment could not be declared.² In one case³ it was held that where a member of a subordinate lodge had money due him for "sick benefits," it was not the right of his lodge to appropriate it in payment of an assessment ordered by the grand lodge, without the member's direction, Pryor, C. J., dissenting. The majority of the court based their opinion on the distinction between the funds created by assessments ordered by the grand lodge, which were for the benefit of the families of members after their death, and the dues collected by the subordinate lodges, which were for the payment of "sick benefits" to sick members.

By the laws of a society each member was required to pay all assessments by the supreme lodge within thirty days after notice under penalty of suspension and forfeiture of all rights. By the laws of the subordinate lodge he was liable to pay dues and fines, and was entitled to five dollars a week when sick, and he could not become in arrears for dues and fines when sick, as they were required to be taken out of his weekly benefit. It was held that under these laws the sickness of a member and his right to weekly benefits did not relieve him from his obligation to pay assessments by the supreme lodge and that his sick benefits could not be applied to the payment of them since such application was confined to the dues and fines of the subordinate lodge.⁴

Under a by-law of a benevolent association, providing for payment of benefits in case of sickness, to "every member in good standing on the books," a member can not be deprived of such benefits because in arrear for dues, where the

¹ Girard Life v. Mutual Life, 97 Pa. Ins. L. Jour. 539; see Hawkshaw v. St. 26; Johnson v. Benefit Ass'n, 2 Supreme Lodge, 29 Fed. Rep. 770; Daily Record (Baltimore Cir. Ct.) 441; Eaton v. Supreme Lodge, 22 Cent. L. Pomeroy's Equity, § 364; Knight v. J. 560; Hansen v. Supreme Lodge, Supreme Council, 6 N. Y. Supp. 427. 140 Ill. 301; 29 N. East. Rep. 1121.

² Johnson v. Benefit Association, ⁴ Hansen v. Supreme Lodge, 140 Ill. 301; 29 N. East. Rep. 1121.

³ Ancient Order v. Moore (Ky.), 9

amount of the dues in arrear is less than the benefits to which he was entitled when they became due.¹

A society has no power, in the absence of a provision therefor in its certificates or its rules and regulations, to charge a member with an assessment made before he became a member, or for losses arising prior to his membership, and where the money deposited by a member to meet future assessments was sufficient to meet all lawful assessments made before his death, he will not be in default by reason of the fact that the society used the money by applying it on an assessment made prior to his becoming a member.²

The omission to pay an assessment will not work a forfeiture when the society has without right received from the member on assessments for losses occurring before he joined the society a larger amount than such unpaid assessment.³ It is not a valid excuse, on the part of a member, for a neglect to pay an assessment, that the society owes him a less sum, if he does not offer to pay the remainder.⁴

In one case it was held that the fact that at the time of the death of a member the society was indebted to him for salary as an officer in an amount greater than the amount of the assessments due from him, did not require the society to apply the amount due to the payment of the assessments.⁵

¹ *Brady v. Coachman's Benevolent Ass'n*, 14 N. Y. S. 272.

² *Evarts v. Association*, 16 N. Y. Supp. 27.

³ *Knight v. Supreme Council*, 6 N. Y. Sup. 427; see *Eaton v. Supreme Lodge*, 22 Cent. Law Jour. 560.

⁴ *Hollister v. Insurance Co.*, 118 Mass. 478; *Bulger v. Ins. Co.*, 63 Ga. 328.

⁵ *Leffingwell v. Grand Lodge*, 86 Iowa, 279, 53 N. W. Rep. 243. *Leffingwell* was a salaried officer of the grand lodge, and a member of Eureka lodge, one of the subordinate branches of the society. The court said: "The rules and regulations of the order specified the time and manner of the payment of assessments and dues, and fixed the consequences

of defaults. The accounts with *Leffingwell* for assessments and dues were kept by Eureka lodge, and payments were made to it. It is true, reports of the standing of each member and of those in arrears were forwarded, from time to time, to the grand lodge, but it was important, in order to avoid confusion of accounts, and to know the duties and obligations of the subordinate to the grand lodge, that the method of payment required by the rules and regulations be followed, that the books of the subordinate lodge should show the exact standing, including arrearages, of each member. Our attention has not been called to any provisions of the contract between defendant and decedent which authorized

§ 272. **By whom payment of an assessment may be made.**—Personal contracts must be performed according to the words and apparent meaning of the parties, and it is obvious that the parties to a contract of insurance may make the payment of an assessment a personal act to be performed by the member himself during his life. A contract stipulated that the society should pay a benefit to the widow of a member, in consideration of certain sums to be paid to the society at certain times during his lifetime, and provided that he should pay certain sums at certain times during his life, and that, if he neglected to pay any such sum for fifteen days after it became due, the contract should be void. A member died, leaving a payment due and unpaid at the time of his death, and his executor tendered the amount within fifteen days after it became due. But the court held that the payment of any such sum was, under the terms of the contract, a personal act to be performed by the member, and that it could not be performed for him after his death.¹ But, in an agreement to pay money as the consideration for a contract, it is not contemplated that the party paying shall, by the act of paying, render to the one receiving any personal service requiring personal skill; and, in the absence of stipulations to the contrary, the payment of an

the former to receive assessments direct from the latter, or to apply any money in its hands belonging to him to the payment of such assessments. It does not appear that Leffingwell ever desired to have the amount due him from the defendant applied on the arrearages in question. It is shown that a few weeks before his death, and at a time when he was sick, the amount of arrearages was tendered to Eureka lodge, but refused because not accompanied by the proper certificate of a physician. It is said that 'equity looks upon that as done which ought to be done,' but that maxim has no application to this case. As defendant had no right to make the desired application, it ought not to have made it, and it can not be regarded as having been made. Had Leffingwell demanded payment of

the amount due him, and been refused, or had he requested that it be applied in payment of the amount he owed, a different question would have been presented. But no equitable circumstances are shown which should except this case from the operation of the general rules. * *

* Rules which govern cases where an insurance company dealing directly with the person insured, and holding unpaid dividends, which it had a right to apply on unpaid premiums, are not applicable to such cases as this, for reasons we have sufficiently indicated."

¹ Want v. Blunt, 12 East 183; see Whiting v. Ins. Co., 129 Mass. 240; Yoe v. Association, 63 Md. 86; Simpson v. Ins. Co., 89 Eng. Com. Law Repts. 257 (2 C. B. N. S.).

assessment is an act which may be performed by any other person than the member. Its payment does not necessarily depend upon his continued capacity or existence. Hence, it has been held that, although an insured was shortly prior to the expiration of the contract of insurance, when about to pay the premium, rendered incapable by the act of God, the beneficiary was without the rule which relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power.¹ The friends and relations of an insured may, and often do, keep up his insurance for years. The act is not a personal one, unless made so by the terms of the contract.² Where the contract provides that an assessment shall be paid within thirty days from the date of notice, payment within that time will preserve the validity of the contract, though made by the beneficiary after the death of the member.³ In the absence of any stipulation to the contrary, the payment of assessments may be made by the beneficiary.⁴

§ 273. **When payment must be made during the lifetime of the member.**—A society may in its contract stipulate that it will receive delinquent assessments within a certain time after they are due provided they are paid within the lifetime of the member. In such a case the member does not forfeit his contract during the period of leniency but carries it at his own risk. If he dies during such period the contract is not binding upon the society. In *Lantz v. Ins. Co.*⁵ the contract of the member was to pay certain assessments at certain times with the further stipulation that if an assessment should not be paid when due and within the lifetime of the assured, the policy should cease and determine. It was held that a continual practice on the part of the society to accept past

¹ *Howell v. Ins. Co.*, 44 N. Y. 276; *Co.*, 39 Fed. Rep. 752; *Bankers' Ass'n Wheeler v. Ins. Co.*, 82 N. Y. 543; 16 *v. Stapp*, 77 Texas 517; 14 S. W. Rep. Hun 317; *Broom's Leg. Max.* 6th 168.

Am. Ed. pp. 178 and 179; see § 295. ³ *Bankers' Association v. Stapp*, 77 Texas 517; 14 S. W. Rep. 168.

² *Worden v. Guardian Mutual*, 39 Sup'r Ct. Repts. p. 317; *Baker v. Benefit Ass'n*, 27 N. Y. Weekly Dig. 25 Atl. Rep. 111.

91; *Rogers v. Capitol Life*, 1 Weekly ⁵ 139 Pa. St. 546; 21 Atl. Rep. 80; *Notes of Cases* 588; *Protection Life v. Palmer*, 81 Ill. 88; *Spocri v. Ins.* App. 472.

due assessments would not make it liable on its policy where such an assessment was not paid during the lifetime of the member.¹ The language of the contract may be such as to require that the payment of the assessment be made during the lifetime of the member. In *Simpson v. Insurance Co.*,² the words of the policy were: "Provided he, the said insured, on or before * * * pay or cause to be paid to the defendant the annual premium;" and on this point the court said: "The policy was to continue, provided he, the insured, paid the premium within the twenty-one days; and this, we think, did not give the executors the right to pay it after his death."³

In *Want v. Blunt et al.*,⁴ the covenant of the society was to pay an annuity, "If Want shall pay, or cause to be paid, the quarterly premium on every quarter day during the life of Want, or within such time after as shall be allowed by the rules of the society for that purpose." The rules of the society provided that if any member should neglect to pay the quarterly premium for fifteen days after the same should become due, the policy should become void. The member died five days after the premium was due, and within the fifteen days allowed by the society for the payment. In construing this provision, the expression "during the life of Want," was held to apply to the latter part of the sentence, and to be the same as if the words "during his life" had been repeated after the words "within such a time after," *i. e.* "within such time after, during his life," etc. The decision was based upon the particular words of the contract, and would seem to be contrary to the established rules of construction given to clauses of forfeiture.

§ 274. **Death within thirty days after notice.**—When, by the terms of a contract of insurance, an assessment is payable at a certain time, "or within thirty days thereafter during the continuance of this certificate," there can be no forfeiture

¹ See *Yoe v. Association*, 63 Md. 86; *Thompson v. Insurance Co.*, 104 U. S. 252; *Insurance Co. v. Rosenberger*, 84 Pa. St. 373; *Insurance Co. v. Rought*, 97 Pa. St. 415; *Whiting v. Ins. Co.*, 129 Mass. 240; *Giddings v. Ins. Co.*, 102 U. S. 108. ² 2 C. B. (N. S.) 257. ³ See *Pritchard v. Society*, 3 C. B. (N. S.) 622; *Ins. Co. v. Ruse*, 8 Ga. 532. ⁴ 12 East 183.

for non-payment until after the expiration of the thirty days; and if the member dies after the certain time fixed, but before the expiration of the "thirty days thereafter," the society is liable.¹ This is not the case of the death of the insured after the premium was due, and within the days of grace. In such case, it is settled that the insured can only take advantage of the days of grace at his own risk, and if he die before actual payment, his beneficiary can not recover. Where the condition of a contract is that the assured shall, within thirty days from the date of notice pay an assessment levied upon him, the society will have no right to declare a forfeiture for non-payment within the thirty days, even though the member dies within that time.²

§ 275. **Payment of an assessment after the death of the member; days of grace.**—It is clear that, in order to hold the society liable, the death of the member must take place during the continuance of the contract of insurance.³ Where a certain time is set for the payment of an assessment, and days of grace are given, in which it may be paid, the member may take advantage of them, and if it is paid or tendered during such days of grace, and in the lifetime of the member, the effect is the same as if it had been paid or tendered when due.⁴ But it seems, he takes advantage of them at his peril, and if he dies during such days of grace, without having paid the assessment, his contract is forfeited, and his beneficiary can not recover.⁵ But the effect of the language used in giving the days of grace, may be such as to absolutely extend the period for the payment of the assessment, so that if the member shall

¹ Rogers v. Capitol Life, 1 Weekly Notes of Cases 588; Baker v. N. Y. St. Mutual, 27 N. Y. Weekly Dig. 91; Banker's Association v. Stapp, 77 Texas 517; 14 S. W. Rep. 168; Elmer v. Association, 19 N. Y. Supp. 289; MacKinnon v. Ins. Co., 83 Wis. 12; 53 N. W. Rep. 19; Wright v. Supreme Commandery, 87 Ga. 426.

² Protection Life v. Palmer, 81 Ill. 88; Ruse v. Mutual Benefit, 26 Barb. 556; Rogers v. Capitol Life, *supra*; Wright v. Supreme Commandery, 87 Ga. 426; 13 S. East. Rep. 564.

³ Howell v. Ins. Co., 44 N. Y. 276; Lockyer v. Offley, 1 T. R. 260; Perry v. Provident Life, 99 Mass. 162.

⁴ Campbell v. Assurance Society, 4 Bosw. 298.

⁵ Pritchard v. Assurance Society, 3 C. B. (N. S.) 622; Simpson v. Ins. Co., 89 Eng. Com. Law Repts. 257; Ruse v. Mutual Ben. Ins. Co., 23 N. Y. 516; Mutual Ben. Life Ins. Co. v. Ruse, 8 Ga. 534; Day v. Ins. Co., 1 McArthur (D. C.) 41; 3 Ins. L. J. 253; Tarleton v. Staniforth, 5 T. R. 695.

die within the days of grace, the society is still bound to accept the money. Such payment, to all intents and purposes, inures as a payment within the time limited, so as to entitle the beneficiary to recover the benefit fund, even though the member be dead at the time the assessment is paid. When, by the terms of the contract an assessment is payable at a certain time, "or within thirty-five days thereafter,"¹ "or within thirty days thereafter, during the continuance of this certificate,"² or when it is payable within thirty days from the date of notice of assessment,³ the risk is extended during such days of grace, and the assessment is not due until they expire. If a member die during the days of grace, given by any one of the contracts just mentioned, leaving the assessment unpaid, it may be paid by the beneficiary or some one for him after the death of the member, and within the time limited. It is, perhaps, doubtful whether the beneficiary need, in such a case, pay the assessment to the society⁴ but it is usually paid or tendered as a matter of precaution. Where a policy was renewable from year to year, but provided that "no policy will be considered valid for more than fifteen days after the expiration of the period limited therein," unless the premium should be paid, it was held that the society was liable for a loss occurring after the end of the year, and before the expiration of the fifteen days, since in effect the contract was an insurance for a year and fifteen days.⁵

§ 276. **Payment to subordinate lodge—Agency of lodges.**—Where a local lodge admits a member into a mutual benefit society, collects his admission fee and all assessments levied upon him, and remits such assessments to the supreme lodge or directory of the society, it is to be regarded as the agent of the supreme lodge or directory, at least to this extent, that payment of assessments to the local lodge is a payment to the

¹ Worden v. Ins. Co., 39 Superior Bankers Ass'n v. Stapp, 77 Texas 517; Ct. Repts. 317. 14 S. W. Rep. 168.

² Rogers v. Capitol Life, 1 Weekly Notes of Cases 589.

³ Elmer v. Association, 19 N. Y. Supp. 289; Protection Life v. Palmer, 81 Ill. 88; Wright v. Supreme Commandery, 85 Ga. 751; Baker v. Benefit Ass'n, 27 N. Y. Weekly Dig. 91;

⁴ Worden v. Ins. Co., *supra*; Vivar v. Supreme Lodge, 52 N. J. L. 455; 20 Atl. Rep. 36; Illinois Order v. Bes-terfield, 37 Ill. App. 522.

⁵ McDonnell v. Carr, Hayes & Jones (Irish), 256.

higher body of the order. The default of the local lodge in paying over to the higher body of the order the assessments paid to it by its members, does not affect the rights of such members.¹ The relations which local and subordinate lodges of such societies shall bear to the supreme lodge or directory and to the members of the order, are proper matters for regulation in the by-laws of the society. Where the by-laws on the subject are artistically and plainly drawn, it is not difficult to determine these relations, but they frequently contain so many inconsistent and vague provisions on the subject that a consistent interpretation and construction of them is impossible. A by-law of the supreme lodge of the Knights of Honor provided that "any lodge failing, neglecting or refusing to forward the same" (the assessment laid upon it) "within thirty days from the date of said notice, shall stand suspended," and that "if a death occur in said lodge during such suspension, no death benefit shall be paid," etc. In construing the meaning of this by-law the supreme court of Indiana said: "This by-law contemplates the restoration of the delinquent lodge on the payment, after suspension, of the required assessment, for it prohibits the payment of such benefits when death occurs *during such suspension*. Now, the question arises, what is meant by the words 'if a death occurs in such lodge during such suspension, no death benefit shall be paid?'"

"Is it meant by the provision to cut off absolutely, as forfeited, all right to death benefits of a member in good standing, who dies during the suspension of his lodge, and who was not in default in the payment of his dues or otherwise, because his lodge was in default at the time of his death, though his lodge afterward pays up and is restored? This would be a harsh construction, and one that can not be adopted, if the provision admits of any other reasonable interpretation. Forfeitures are not favored in law, and instruments will be so construed as to avoid them, if it can be done without doing violence to the language employed. * * We think the pro-

¹ Schunck v. Gegenseitiger Witt- App. 127; see Schen v. Grand Lodge, wen und Waisen-Fond, 44 Wis. 369; 17 Fed. Rep. 214; Hall v. Supreme Erdmann v. Mut. Ins. Co., Order Lodge, 24 Fed. Rep. 450; Hoffman v. Herman's Sons, 44 Wis. 376; Barbaro Supreme Council, 35 Fed. Rep. 252; v. Occidental Grove, 4 Mo. App. 429; Oates v. Supreme Court, 4 Ontario Borgraefe v. Supreme Lodge, 22 Mo. 535.

vision, fairly construed, means that where death occurs during the suspension of the subordinate lodge, no death benefit shall be paid during such suspension, as if it read as follows: 'If a death occur in said lodge during such suspension, no death benefit shall be paid during such suspension.' This construction seems to us to be reasonable and well calculated to carry out the general purpose of the defendant's organization. When a subordinate lodge is thus suspended, no death benefits are to be paid on behalf of members dying during the suspension. This is a strong incentive to the delinquent lodge to respond to the calls upon it, and be restored. When restored, the rights to death benefits, which were suspended with the suspension of the lodge, are restored with its restoration."¹ A member of a society was sick and unable to go to the lodge, and he handed the amount due on an assessment to his wife, and directed her to give it to E. to carry to the lodge. As he was not going, E. gave it to the member's brother-in-law, D. D. went into a saloon and gave it to P. who was the janitor of the lodge rooms, but who had no authority to receive money for it. P. never paid it to the lodge, and the question was as to whether the payment to him was sufficient. The court held that P. was not the agent of the lodge, but of the member, and that payment to him was not payment to the lodge.² The constitution of a subordinate lodge of a society provided that the secretary should receive assessments paid by its members to the society, and that the lodge might permit him to select an assistant for whose acts he should be responsible. The secretary of the lodge had no office, but it was the uniform practice of members to pay assessments to his wife, at his house, in his absence, and, her authority to receive them never having been questioned, she was held to be his assistant to whom payments might properly be made.³

§ 277. **Authority of agents to collect assessments.**—Where a person is an agent of a society for a specific purpose

¹ Supreme Lodge v. Abbott, 82 Ind. 1; but see Peet v. Great Camp, 83 Mich. 92, 47 N. W. Rep. 119, where 11 Ins. L. J. 164.

² Fisher v. Schiller Lodge (Iowa) 3 Anderson v. Supreme Council, 135 N. Y. 107; 33 N. East. Rep. 1092; of a society was held to suspend a member of the lodge who had no notice that it was in default. affirming 16 N. Y. Supp. 947.

and is known to be such by those dealing with him, he can not bind the society by an act done without the scope of his authority. If his authority extends only to the single act of collecting assessments from members, and he collects them from a stranger, without any notification from the society that he is a member, he can not thereby bind it, force upon it a member whom it has not accepted, and render it liable for benefits. Authority to make the collection or a subsequent ratification of the unauthorized act must be shown.¹ An agent's authority can not be shown by his own declarations, and a party who avails himself of the act of an agent must, in order to give in evidence his declarations to charge his principal, prove the authority under which the agent acted; the burden of proof lies on him to establish the agency, and the extent of it.² The paymaster of a railroad company, who has nothing to do with making out the pay-roll, is a servant, and not an agent, and has no authority to deduct dues owed by an employe to an employes' relief society, though its constitution and by-laws authorize the company to do so; and his declarations that the deduction had been made are inadmissible in an action against the society.³

§ 278. **A receipt for an assessment may be contradicted.**—An acknowledgment in a certificate of membership that the admission fee and certain assessments have been paid may be contradicted or explained; it is not conclusive, and does not operate as an estoppel.⁴ But where a certificate provided that if a "binding receipt" should be issued, and the "number of a binding receipt is inserted, it becomes conclusive evidence that

¹ *Greene v. Ins. Co.*, 91 Pa. St. 387; *is authorized to use discretion then B. & O. Ass'n v. Post*, 122 Pa. St. 579; 15 Atl. Rep. 885; *Swett v. Relief Society*, 78 Me. 541; 7 Atl. Rep. 364.

² *B. & O. Ass'n v. Post*, *supra*. In *Wharton on Evidence*, at section 1182 it is said: "We must remember that a servant moves within a limited orbit, one far more limited than that of an agent; and that consequently the admissions of a servant are more jealously guarded than are those of an agent. An agent is authorized to exercise discretion. When a servant

he ceases to be a servant and becomes an agent. Those dealing with a mere servant, knowing him to be such, know that, except in the immediate discharge of a mechanical duty, he is not authorized to bind his master by his admissions. Hence, ordinarily, a master, except within such range, is not so bound." See *Fairlie v. Hastings*, 10 Ves. 126; see § 301 note.

³ *B. & O. Relief Ass'n v. Post*, *supra*.

⁴ See *Bliss on Life Ins.* at § 373.

the above amount has been paid," and the number of a binding receipt was inserted in the certificate, it was held that, as against the beneficiary, the insurer was estopped from showing that the assessment, acknowledged in the policy and in the "binding receipt" to have been received, had not been paid.¹ Some authorities go so far as to hold that, upon grounds of public policy, an insurance company will be estopped to deny, as against its acknowledgment in its policy, that the consideration for the policy has been paid.² But, according to the weight of authority, the recital in a delivered policy, of the receipt of the consideration for which it was issued, is *prima facie*, and only *prima facie* evidence of the fact.³

§ 279. **Tender of an assessment.**—The tender of an assessment is just as effectual to preserve the rights of a subordinate lodge and its members, or the rights of a member of a mutual benefit society, as the payment of the assessment. For the purpose of avoiding penalties and forfeitures, or the loss of any right or privilege, a tender is the exact equivalent of payment. It does not have to be repeated. After the tender is made, the burden is on the creditor to act. He must demand the debt, and it is only required of the debtor that he be ready to meet the demand.⁴ In mutual benefit societies, the holder of a certificate is entitled to notice of an assessment before he can be declared to be in default for its non-payment, and, in the absence of notice, no tender of the amount of such assessment is necessary, in order to prevent a forfeiture of membership.⁵ If a member who has been expelled from a society appeals to a higher tribunal within the order, or resorts to court for reinstatement as a member, and, pending the appeal or

¹ Kline v. National Benefit Ass'n, 111 Ind. 462; 11 N. E. Rep. 620; National Benefit Ass'n v. Jackson, 114 Ill. 533.

² Provident Life v. Fennell, 49 Ill. 180; Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Grit v. National Insurance Co., 25 Barb. 189; 3 Kent's Com. 260; Insurance Co. v. Cashow, 41 Md. 59.

³ 1 Greenleaf Ev. at section 305; Ins. Co. v. Carpenter, 4 Wis. 20; Bergson v. Ins. Co., 38 Cal. 541; Ins. Co.

v. Smith, 3 Whart. 520; Sheldon v. Ins. Co., 26 N. Y. 460; Baker v. Ins. Co., 43 N. Y. 283; Ins. Co. v. Hasbrook, 32 Ind. 447.

⁴ Campbell v. Society, 4 Bosworth, 298; Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 450; People v. Mutual Life, 92 N. Y. 105; Meyer v. Ins. Co., 73 N. Y. 516; Roeding v. Sons of Moses, 11 N. Y. Supp. 712.

⁵ Covenant Benefit Ass'n v. Spies, 114 Ill. 467.

legal proceedings, regularly tenders his dues and assessments until his death, his beneficiary, on a reversal of the judgment, or upon a reinstatement by the court, after his death, will be entitled to the benefit.¹ If assessments are payable only after notice, the member will be under no obligation to make the tender until he has been notified of the assessment.² Where a society has declared a contract forfeited, and has refused to receive an assessment from a member, his subsequent failure to tender assessments will not affect the right to recover on the contract.³

Where the constitution of a society provides that the financial reporter of a subordinate lodge shall receive all moneys⁷ due the lodge, and give a bond for the discharge of his duties, and does not authorize any other person to receive or decline a payment of an assessment, and a notice of an assessment states that it must be paid to the financial reporter only, a tender of payment of the assessment to the secretary, an officer not under bond, and his refusal to accept it, on the ground that the member is suspended, are ineffectual to bind the society, even though it is customary for the secretary and other officers to receive payment of assessments.⁴ For the accommodation of the members, the various officers of a lodge frequently accept dues and assessments, and pay them to the proper officer. While the practice may be open to objection, still, so long as the money is eventually paid into the treasury, no harm results. But when one of these voluntary messengers declines to receive them from a member, alleging as a ground of such refusal that the member has been suspended, it becomes a serious matter, and such a custom may not be shown to vary the terms of the constitution or the directions contained in the notice of assessment, especially where it does not appear that the supreme lodge had notice of such custom. But where a society knows that its secretary habitually receives assessments from members and pays them over to it, it is estopped to deny his authority to receive them, notwith-

¹ *Marck v. Supreme Lodge*, 29 Fed. 236; *Meyer v. Ins. Co.*, 73 N. Y. 516; Rep. 896. *Miesell v. Ins. Co.*, 76 N. Y. 115.

² *Vivar v. Supreme Lodge K. of P.*, 52 N. J. L. 455; 20 Atl. Rep. 36. ⁴ *Lazensky v. Supreme Lodge, K. of H.*, 3 N. Y. Sup. 52; 19 N. Y. St.

³ *Girard Life v. Ins. Co.*, 86 Pa. St. Rep. 795.

standing its by-laws require the treasurer to receive all money due to it.¹ The statement of an officer of a society, that a past due assessment would have been received if it had been tendered is not competent evidence.²

§ 280. **Refusal of society to accept assessment—Remedy of member.**—Where a mutual benefit society has refused to receive from the member the amount of the assessment on his certificate, basing such refusal on the ground that the rights of the member had been forfeited by non-payment of the assessment at the time stipulated for its payment, the member, if the refusal is wrongful, has an election of remedies. He may, if it be practicable under the plan of paying assessments, tender the assessments as they become due until the certificate is payable, and then his beneficiary may recover the amount provided for therein in an action on the contract.³ He may, in an action for the rescission of the contract, recover back the assessments paid, with interest;⁴ or he may maintain an action to obtain a decree ordering that the certificate be continued in force and recognized as valid by the society.⁵

§ 281. **Effect of the return of assessments once paid.**—When the payment of an assessment has been made within the prescribed time, or has been received by the society under such circumstances as to waive the forfeiture for failure to pay it promptly, the return of the money to the member or his beneficiary will have no effect upon the rights of the parties.⁶ After the time had passed for the payment of an assessment, an agent of the society called upon the wife of a member and collected it from her, giving her a receipt for it. The member had been drowned the day before, but neither the wife nor the agent knew that fact. The officers of the society learned of the fact before the money was paid into the treasury, and refused to receive it. The day after the member was buried,

¹ Roeding v. Sons of Moses, 11 N. Y. Supp. 712.

² Painter v. Association, 14 Ins. L. J. 556.

³ Oates v. Supreme Court, 4 Ontario 535.

⁴ True v. Association, 78 Wis. 287; 47 N. W. Rep. 520.

⁵ Union Cent. L. Ins. Co. v. Pott-

ker, 33 Oh. St. 459; Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; Day v. Conn. Gen. L. Ins. Co., 45 Conn. 480; May on Ins. at section 356 *et seq.*; N. Y. Life Ins. Co. v. Statham, 93 U. S. 24; Phoenix Ins. Co. v. Baker, 85 Ill. 210.

⁶ Burlington Relief v. White (Neb.),

59 N. W. Rep. 747.

the agent called upon the widow, and explained to her the facts. She took back the money which she had paid, and gave up the receipt which she had received of him for it. The court held that the widow, in taking back the money which she had paid and in giving up her receipt therefor, did not release her rights in the fund—the consideration, \$1, the amount of the assessment returned, being grossly inadequate, as the fund amounted to \$264; that the consideration of hardship upon the society had no weight, as it only lost the interest on \$1 for a few days, and it might have had the dollar at any time by asking for it.¹

§ 282. **Recovery of assessments paid by a member.**—The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void *ab initio*. The risk may never have attached, by reason of misrepresentations or breach of warranty of the assured, without fraud on his part. In such cases, he may recover back all the premiums he may have paid. But when the risk has attached, premiums paid during the continuance of the policy can not be recovered.² These principles are applicable to assessments in mutual benefit societies.³ Where the charter of a mutual benefit society provides that the benefit fund shall, upon the death of a member, be paid to his widow and children, they are entitled to the fund, although another person is named in the certificate of membership as the beneficiary, and has paid all the assessments upon the certificate. The certificate must be construed in connection with the charter as a contract to pay to the widow and children of the member the amount of the insurance. If a certificate in such a society is made payable to a creditor of the member, it is not void, but is an existing contract in favor of the member's wife and children. As it is not void, the creditor can not recover of the society the amount of the assessments which he has paid to it in consideration of the insurance. Upon the death of the member, however, he is entitled to have restored

¹ Mutual Relief Society v. Billau (Superior Court of Cincinnati), 3 Am. N. W. Rep. 799; Gray v. Association, 111 Ind. 531; 11 N. East. Rep. 477.

² May on Insurance at section 567;
Bliss on Life Insurance at section 415.

to him all that he has expended for the benefit of the beneficiaries named in the charter.¹ Where the provisions of an act for a relief fund by contributions from the members of an order, such as a police force, can not be carried into effect without compulsory contributions, and the courts decide that such contributions are not compulsory under the act, payments made before the decision, under the belief that they were compulsory, or unwillingly and under protest, should be refunded; the object of the act having failed, no benefit under the act was acquired pending the decision.²

§ 283. **Promise of the society to receive a past due assessment.**—The promise of a society to receive an assessment made without any consideration and after the assessment is past due, is not binding on it. The promise of a society to waive a right of forfeiture must either be supported by a valuable consideration, or it must be made by or on behalf of the society while the member still has time and opportunity to make payment.³ But an agreement by the society before default to extend the time of payment of an assessment is supported by a sufficient consideration in the fact that the contract is thereby kept alive for the benefit of both parties.⁴ It has been held that as the acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture, precisely the same effect should be given to an agreement to accept at a future time such overdue premium and a tender in pursuance of such agreement. In speaking of acts showing an election to continue the existence of a contract of insurance, and to waive a forfeiture incurred, it was said in one case:⁵ "It is conceded that this acceptance of a payment has

¹ Gibson v. Ky. Grangers' Mut. 278; Underwood v. Farmers', etc., Ins. Ben. Society, 8 Ky. L. Rep. (Sup'r Ct.) 520; Ky. Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. L. Rep. (Sup'r Ct.) 750. ⁴ Mich. Mutual v. Custer, 128 Ind. 25; 27 N. East. Rep. 124; Homer v. Ins. Co., 67 N. Y. 478; Wyman v. Ins. Co., 119 N. Y. 274; 23 N. East. Rep. 907; Ins. Co. v. Tomlinson, 125 Wright, 33 Oh. St. 533; Douglas v. Ins. Co., 83 N. Y. 492; Knights v. Burke (Texas), 15 S. W. Rep. 45; East. Rep. 722.

² Murray v. Buckley, 1 N. Y. Supplement 247. As to recovery of assessments, see U. S. Ins. Co. v. Wright, 33 Oh. St. 533; Douglas v. Ins. Co., 83 N. Y. 492; Knights v. Burke (Texas), 15 S. W. Rep. 45; Frain v. Ins. Co., 67 Mich. 527; N. A. Ins. Co. v. Wilson, 111 Mass. 542. ⁵ Insurance Company v. Norton, 96 U. S. 234.

³ Marvin v. Universal Life, 85 N. Y.

this effect; and we do not see why an agreement to accept and a tender of payment according to the agreement should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy.”¹

§ 284. **Reimbursement of one who has paid assessments for another.**—The payment of assessments by a stranger without any contract with the member or the person entitled to the benefit of the insurance, gives him no title to, or lien on the benefit fund. In the eye of the law, the person making such payments is a mere volunteer. Assessments voluntarily paid on a contract of life insurance belonging to another can not, in the absence of an agreement, be recovered of the beneficiary; and the person making such payments has no lien for them on the benefit fund collected by him as agent of the beneficiary.² Where by the terms of the assignment by a member of a contract of insurance, to a creditor to secure his debt, the assignee is to pay the assessments, and these are to be repaid out of the proceeds of the insurance when collected, the statutes of limitation do not apply to assessments paid more than six years before the contract matured or the suit was commenced on it.³

¹ See *Murray v. Association*, 90 Cal. Muehl, 81 Ky. 336; *National Mutual* 402; *Viele v. Ins. Co.*, 26 Iowa 9; 96 v. Lupold, 101 Pa. St. 111; *Gibson v. Am. Dec.* 83; *Queen Ins. Co. v. Young*, Society, 8 Ky. L. Rep. 520; *Kentucky* 86 Ala. 424; *Titus v. Ins. Co.*, 81 N. Grangers v. McGregor, 7 Ky. L. Rep. Y. 419; see § 307. 750.

² *Meier v. Meier*, 15 Mo. App. 68; ³ *Walker v. Larkin*, 127 Ind. 100; affirmed, 88 Mo. 566; see *Lockwood v.* 26 N. East. Rep. 684. *Bishop*, 51 How. Pr. 221; *Weisert v.*

CHAPTER XX.

ASSESSMENTS.

- § 285, 286. Forfeiture for non-payment of an assessment.
287, 288. When an affirmative act of the society declaring the forfeiture is necessary.
289, 290. When an affirmative act of the society declaring the forfeiture is not necessary.
291-294. Restoration after suspension or forfeiture for non-payment.
295. Excuse for non-payment, insanity, act of God.
296. Excuse for non-payment, Sunday, holiday.

§ 285. **Forfeiture for non-payment of assessment.**—In mutual benefit societies provision is made either in the charter, by-laws, or certificates of membership for assessments upon members to pay death losses, and for forfeiture of all rights of membership, in case assessments are not paid in accordance with the rules and regulations. As these societies have no means of meeting their obligations, except from assessments on their members, it is proper and necessary to make stringent provisions for their prompt payment. Provisions for forfeiture in case of non-payment within a certain stipulated time have been repeatedly held to be valid and binding in ordinary life policies, and there are many reasons why they should be more rigidly applied in mutual assessment societies.¹ As has been heretofore stated, the levy of an assessment by a mutual benefit society, as a general rule, creates no liability on the part of the member to pay, and it is, therefore, apparent that rigid and stringent provisions for forfeiture for non-payment of assessments are necessary for the existence of such societies. A certificate of insurance, issued to one of its members by a society, in which the plan of meeting its losses and expenses is by levying assessments upon its members, is not forfeited or suspended by the failure of a member to pay an assessment thus levied, unless such for-

¹ *Madeira v. Merchants' Exchange Mutual*, 16 Fed. Rep. 749.

feiture or suspension is provided for as a part of the contract of insurance.¹ A contract provided that assessments should be made at stated times to meet claims by death, and that a member failing to receive a notice of an assessment should notify the home office of that fact. This duty of the member was not made a condition, the non-performance of which would cause a forfeiture of membership, and his failure to inform the society that he had not received notice of an assessment was immaterial, and could not excuse its failure to give the required notice.² It is sometimes said that forfeitures are odious in law, but this expression is too strong. Forfeitures are not favored, but they will be enforced for a breach of the condition agreed upon when this condition is clearly set forth and the intention of the parties is manifest. Technical constructions in aid of forfeitures will never be given, but, on the contrary, an instrument will be continued as binding if it can be done without violence to its express provisions.³ One of the by-laws of a society provided for giving written notice to any member in arrears six months for dues, calling his attention to the fact that his name would be stricken from the roll, in case he did not pay his dues. Another by-law imposed a fine for an omission of a member to give notice to the society of a change of residence. At the time he was admitted, plaintiff's intestate gave notice of his then place of residence. He subsequently changed his residence, but did not give notice. Because of failure to pay his dues, his name was stricken from the rolls. No notice was given him as provided by the by-laws. In an action brought after his death to recover the benefit fund, it was held that plaintiff was entitled to recover; that the omission of the deceased to give notice of his change of residence was no excuse for a failure to give him the prescribed notice.⁴ Where the contract of insurance is

¹ District Grand Lodge v. Cohn, 20 Co., 44 Wis. 376; Schunck v. Society, Ill. App. 335; Sanford v. Cal. Ins. 44 Wis. 369, 372; Bates v. Ass'n, 51 Association, 63 Cal. 547; Mut. Ben. Mich. 587; 1 Am. & Eng. Corp. Life Ins. Co. v. French, 30 Ohio St. Cases, 186; Franklin Life v. Wallace, 93 Ind. 7; Supreme Lodge v. Abbott, 82 Ind. 1; 11 Ins. L. J. 907; Symonds v. Ins. Co., 23 Minn. 491.

² Mutual Reserve v. Hamlin, 139 U. S. 297; 11 Sup. Ct. Rep. 614.

³ Miner v. Association, 63 Mich. 338; 29 N. W. Rep. 838; Hull v. Ins. Society, 84 N. Y. 28.
⁴ Wachtel v. Widows and Orphans' Co., 39 Wis. 397; Erdmann v. Ins.

silent as to whether a member in default shall have notice of his proposed expulsion, such notice must be given in order that he may have an opportunity to be heard.¹ Where, by the by-laws, notice is required to be given to members who fail to pay their assessments, there can be no forfeiture without such notice.² A by-law of a society is to the effect that, "when a member neglects for six months to pay his contributions, or the entire amount of his entrance, the society may strike his name from the list of members, and thereupon he no longer forms part of the association. To that end, at each regular general meeting the collectors-treasurers are bound to make known the names of those thus indebted for six months' contributions, or for a balance of their entrance; and thereupon any member may make a motion that such members be struck from the list of the society's members." Under this by-law, a member may not be expelled without notice and opportunity to be heard upon the subject of his arrearage.³ Such a by-law does not take from a delinquent member either expressly or by implication, the right to notice, and this right is valuable, because, on such notice, a member may give a sufficient excuse for his delinquency, or, on hearing him, the society may be inclined not to exercise rigor in enforcing the penalty of default.

A mutual benefit society was organized for the express purpose of becoming the successor of "The Widows' and Orphans' Mutual Aid Society." A resolution of the new society provided for the surrender of the old certificates, and the issue of new certificates by it as successor, and further provided: "All assessments made by the old society on its members, not due at the time of transfer of the member from the old to the new organization, shall become due and payable to the latter on the day it would become due and payable to the society, had the member not been transferred therefrom." A member surrendered his old certificate and received a new one from the new society. This stipulated for the payment of a certain sum, and

¹ Fritz v. St. Stephen's Society, 62 How. Pr. 216; How. Pr. 69; see § 61. nevolent Society, 24 How. Pr. 216; Mutual Reserve v. Hamlin, 139 U. S.

² Pulford v. Fire Department, 31 Mich. 458; Wachtel v. Benevolent 297; 11 Sup. Ct. Rep. 614.

³ Lapierre v. L'Union St. Joseph, Society, 84 N. Y. 28; People v. Be- 21 Lower Canada Jurist 332.

provided that "a failure to pay at the home office any assessment made by the society within the prescribed time, shall work a forfeiture of this certificate, and the party can only be reinstated on terms as set forth in the by-laws." In an action on the certificate, the society set up the non-payment by the deceased member of an assessment made against him by the old organization to meet a death loss while he was a member thereof, and which sum, by the terms of the resolution under which he was admitted to membership in the new society, became payable to it, but it was held that, under the contract, a failure to pay assessments made by the new society, not by the old, worked a forfeiture.¹ Where the by-laws of a society require written notice of forfeiture to be given, proof of any other notice is properly excluded.²

A certificate was issued to a member in consideration of a membership fee of \$10 paid, "and the further payment of one assessment within thirty days after the date of such assessment, whenever made in accordance with the terms and conditions of the constitution and by-laws of the association, as they may now exist or may hereafter be modified." A by-law provided that "every member failing to pay his assessment within thirty days from the date of said assessment, shall stand suspended from all benefits and privileges of the association." A proper construction of this contract is, that if one assessment is not paid within the time as therein provided, it shall be null and void; but it does not mean that unless one assessment is paid, there can be no recovery. There may be no assessment made after the issuing of the certificate and before the death of the member, and in that case the beneficiary may recover.³

§ 286. It will not be presumed that some other person than the member has paid his assessment, and an averment that a deceased member did not pay an assessment within the stipulated time after notice is good as showing that it was not in fact paid. If it has been paid by some other person, such payment may properly be set up in the pleadings by the

¹ *Abe Lincoln Society v. Miller*, 23 560; 8 S. E. Rep. 27; see § 61 *et seq.* Ill. App. 34.

³ *Stanley v. N. W. Life Ass'n*, 36

² *Dial v. Valley Mutual*, 29 S. C. Fed. Rep. 75.

plaintiff.¹ Under the constitution of a society which provides that a member shall be entitled to funeral benefits if he is "not more than three months' dues in arrears at the time of his death," a member whose dues are in arrears for three months, and who dies the day before the dues for the following month are payable, is entitled to funeral benefits.² The dues of members of a lodge may accrue weekly and be payable quarterly. In such a case a forfeiture may not be claimed until after the quarterly installment has become delinquent.³ Where the suspension of a member is illegal, the refusal of the subordinate society to credit him with assessments paid thereafter, or to give to the proper officers the required notice of his death does not prejudice the right of his beneficiary to recover on the certificate, when he has done everything required of him by the contract.⁴

When by the terms of a contract of insurance, an assessment is payable at a certain time, "or within thirty days thereafter during the continuance of this certificate," there can be no forfeiture for non-payment until after the expiration of the thirty days; and if the member dies after the certain time fixed, but before the expiration of the "thirty days thereafter," the society is liable.⁵ This is not the case of the death of an insured after the premium for the insurance is due, and within the days of grace. In the latter case, it seems to be settled that the insured can only take advantage of the days of grace at his own risk, and if he dies before actual payment, his beneficiary can not recover.⁶ A waiver of forfeiture on the part of the society, procured by false representations, is void.⁷ Punctuality in the payment of assessments is of the very essence of the contract, and, when payment is not made within the stipulated time, the society may forfeit the contract. The burden is upon the society to establish the failure of the member to pay an assessment within the stipulated time.⁸ A mem-

¹ Gray v. Supreme Lodge, 118 Ind. 293; 20 N. East. Rep. 833.

² Sherry v. Union, 139 Pa. St. 470; 20 Atl. Rep. 1062.

³ Strasser v. Staats, 13 N. Y. Supp. 167.

⁴ Spoeri v. Ins. Co., 39 Fed. Rep. 752.

⁵ Protection Life, etc., v. Palmer, 81 Ill. 88; Rogers v. Capitol Life, 1 Weekly Notes of Cases 589; Baker v. N. Y. St. Mutual, 27 N. Y. Weekly Dig. 91; see § 274.

⁶ See § 275.

⁷ Harris v. Society, 64 N. Y. 196.

⁸ Tobin v. Society, 72 Iowa, 261; 33

ber is in good standing in a mutual benefit society so long as he faithfully performs his duty as a member of the society and regularly pays or tenders his dues and assessments. The society can not deprive him of any rights by wrongfully refusing to accept dues and assessments tendered by him under the contract of insurance. A member of a subordinate court of the supreme court of the Independent Order of Foresters was insured under the endowment provisions thereof, for \$1,000. This court left the order in a body, and was consequently suspended. By the rules of the order members of suspended courts in good standing at suspension were, on application within thirty days to the supreme secretary and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. The member, ascertaining that his court had been suspended from the order and being then in good standing, applied within thirty days, to the supreme secretary of the order for his card of membership, tendering \$1, and assessments due, which were refused on the ground that a medical certificate was necessary. The member, by reason of his not having the card, was prevented from affiliating with another court, though he endeavored to do so. He regularly tendered his monthly assessments until he died. It was held, on these facts, that he died in good standing, and that his beneficiary was entitled to the benefit fund.¹

When under the laws of a society a subordinate lodge may be suspended and during such suspension no member of the lodge is entitled to benefits unless he takes out a special certificate from the society within thirty days after the suspension, a member of the lodge is not entitled, in the absence of a special provision in the contract, to notice of its suspension, but he must take notice of it. It is not unreasonable to presume that each member of the lodge will at once know of its suspension.² Non-payment of an assessment during sickness

N. W. Rep. 663; *Hodsdon v. Ins. Co.*, 4 Ontario 535; see *Pett v. Great* 97 Mass. 144; *Scheufler v. Grand Camp*, 83 Mich. 92; 47 N. W. Rep. Lodge, 45 Minn. 256; 47 N. W. Rep. 119.

799. ² *Pett v. Great Camp*, 83 Mich. 92;

¹ *Oates v. Supreme Court of Forest-* 47 N. W. Rep. 119.

will not forfeit a contract of insurance where the laws of the society provide that it shall not.¹

§ 287. **When an affirmative act of the society declaring the forfeiture is necessary.**—In order to work a forfeiture of the rights of a member, the society must, as a general rule, take definite action upon the default of the member and declare the contract at an end. By the express and unequivocal terms of the contract the default of the member may of itself work a forfeiture, but a construction which will summarily cut off the substantial rights of a member is never favored. The society at large, or the proper tribunal of the society to which the requisite authority has been distinctly given by the terms of the contract, must suspend the member or declare the contract forfeited.² Where the laws of a society require the payment of an assessment within thirty days after the date of the notice on penalty of suspension, and provide that the time for considering the subject of the suspension of a delinquent member shall be fixed by a vote of the society, an order of an officer, suspending a member for non-payment of an assessment, without the required vote is inoperative.³ Where it is provided that any member who shall not pay within a certain time “shall forfeit his claim to membership and have his name stricken from the roll,” this provision is not self-executing, but requires affirmative action on the part of the society declaring the forfeiture in order to terminate his membership.⁴ The society must ascertain the fact of delinquency and impose the penalty, and until that is done, his membership is not terminated.

The charter of a society provided: “Should any member neglect to pay his arrearages for three months, he shall be expelled.” In construing this provision, the court said: “There must be some act of the society declaring the expulsion, and this can not be done without a vote of expulsion, after notice to the member supposed to be in default. For it may be that he may either prove that he is not in arrears, or give such reason for his default as the society may think sufficient. If

¹ Grand Lodge v. Brand, 29 Neb. Supreme Lodge v. Kalinski, 57 Fed. Rep. 644.

² See § 67 *et seq.*

⁴ N. W. Association v. Schauss,

³ Knights of Honor v. Wickser, 148 Ill. 304; 35 N. East. Rep. 747.

72 Texas 257; 12 S. W. Rep. 175; see

he is present when the subject is taken up, and willing to enter into the inquiry immediately, there is no occasion for further notice. But no man should be expelled in his absence without notice. It appears that Hansell was present, but no question was made, nor any vote taken on his expulsion. He had an excuse to offer, viz., that the society was indebted to him for his services as secretary in a larger sum than the amount of the arrears of his monthly contribution. And had he urged this defense when the question of his expulsion was put, there is no saying what influence it might have had on the vote. Be that as it may, he ought to have had the opportunity. The terms of the charter have not been complied with.”¹ The constitution of an incorporated voluntary society, after providing that every member shall pay into the treasury a designated annual contribution to become due and payable on January 1 of each year, declares that if the contribution is not paid by the first meeting in April, thereafter, the defaulter shall forfeit his membership, and his name shall be stricken from the roll of members, “and of this he shall be duly notified by the secretary;” and imposes upon the treasurer the duty of serving, on or about March 1, of each year, upon every member in arrears, a written notice, calling his attention to the foregoing requirement. It is further declared that “the first regular meeting in April of each year shall be the regular meeting for the revision of the roll of members,” at which the treasurer is required to report “the names of all members whose dues for the year have not been paid,” and all such names “shall be immediately stricken from the roll.” The treasurer is declared to be “personally responsible to the society for the dues of all defaulting members not so reported.”

It further provides that the treasurer “shall report to the society, at the annual meeting for the revision of the roll, a written statement of the names of members who are in arrears for the dues of the year, so that they may be stricken from the roll; but this written statement shall not be spread

¹ Commonwealth v. Pennsylvania Scheufler v. Grand Lodge, 45 Minn. Beneficial Institution, 2 Ser. & Raw. 256; 47 N. W. Rep. 799; Backdahl v. 141; see also Sibley v. Carteret Club, Grand Lodge, 46 Minn. 61; 48 N. 40 N. J. L. 296; Gray v. Society, 137 W. Rep. 454; N. W. Association v. Mass. 329; McDonald v. Supreme Schauss, 148 Ill. 304; 35 N. East. Rep. Council, 78 Cal. 49; 20 Pac. Rep. 41; 747.

upon the minutes." Another article provided in detail for the order of business at what is designated as "the regular meeting for the revision of the roll," specifying *inter alia*, "the treasurer's report of members in arrears" and the "revision of the roll by the secretary." It is also declared that "any one of these orders of business may be suspended at any time by the vote of a majority of the members present at any meeting." In construing these several provisions *in pari materia*, as they should be construed, the supreme court of Alabama held that the non-payment of annual dues by a member, by the first meeting in April, is not, *ipso facto*, a forfeiture of membership, but only a ground of forfeiture, in the nature of a judgment *nisi*, to be made final by the vote of the society; that where no statement or report had been made by the treasurer at the regular meeting in April, as required by the constitution, and no vote of the society had been taken on the subject, the mere reading, at that meeting, of the name of a member from a book as a delinquent, did not operate to forfeit his membership; that the action of a society at a subsequent meeting, of which such delinquent had no notice, actual or constructive, declaring a forfeiture of his membership for non-payment of dues, was irregular and not binding on him, and that on his application, *mandamus* would lie to vacate it and restore him to membership.¹ The law of a society provided that members should pay their assessments within thirty days after notice, and the records of the society showed a suspension before the expiration of that time. There was no other evidence, and the court held that such suspension afforded no proof of the non-payment of an assessment, or of any default of the member. There being no evidence of the non-payment of an assessment, the member could not be held to be in default by reason of having made no application for reinstatement, under rules wholly applicable to suspension for the non-payment of assessments.²

§ 288. Forfeiture of membership for non-payment of an assessment can not be declared *nunc pro tunc* after the loss, if

¹ Medical Society v. Weatherly, 75 Ala. 248; v. Musical Union, 47 Hun 273; People v. Protective Union, 118 N. Y. 101;

² Lazensky v. Supreme Lodge K. 23 N. East. Rep. 129. of H., 31 Fed. Rep. 592; see People

the policy was in force when the loss took place, and a member can not be suspended after his death for non-payment of an assessment so as to avoid a policy in force at the time of his death.¹ The charter of a society provided that, if a member did not pay his assessment within thirty days after demand, his insurance might be suspended by the secretary or board of directors, but if suspended by the secretary, appeal might be made to the board of directors when in session, and it was held that such forfeiture could not properly be imposed as an *ex parte* result of mere default in payment, and without giving the assured an opportunity for hearing.² S. was a member of a subordinate lodge of Independent Foresters, and by the terms of its constitution and by-laws, became a member of the grand lodge. The death assessments were required to be collected by the subordinate lodge, and forwarded to the grand lodge, the subordinate lodge being compelled to account for these assessments, and pay them to the grand lodge, unless the member had been expelled or suspended. The assessment of S. was paid by the subordinate lodge to the grand lodge, but, at the time of his death, had not been paid by him to the subordinate lodge. The by-laws provided that "any member failing to pay his assessment within thirty days shall be suspended," and also provided that notice should be given to the grand secretary of the grand lodge. On the death of S. his widow brought suit for the amount due from the grand lodge, and the court held that the mere non-payment of assessment did not of itself operate as a suspension, nor did the clerical act of the secretary in marking S.'s account suspended. The suspension must be by some affirmative act of the lodge. Such suspension may be waived by the lodge, either expressly, or by failure to act. The grand lodge having received the assessment, was liable to the widow.³

In an action against a society, where the certificate is made payable upon condition that the insured is in good standing in the society at his death, and the constitution provides that

¹ *Olmstead v. Farmers' Mutual*, 50 Ins. Co. v. McLennon, 6 Ins. L. J. Mich. 200; *Baker v. Citizens' Mutual*, 124.
51 Mich. 243.

² *Scheu v. Grand Lodge*, 17 Fed.

³ *Olmstead v. Farmers' Mutual*, Rep. 214; see *Hall v. Supreme Lodge* etc., 50 Mich. 200; but see *Equitable K. of H.*, 24 Fed. Rep. 450.

upon due trial and conviction of unbecoming conduct a member shall be reprimanded, suspended or expelled, the loss of good standing can only be shown by proof of some official action by the society, and oral evidence thereof is not admissible.¹

§ 289. **When an affirmative act of the society declaring a forfeiture is not necessary.**—However abhorrent it may be to all reason to permit the expulsion of a member without notice and hearing, or opportunity to be heard, for an alleged violation of his duty as a citizen or a corporator, and notwithstanding the fact that a by-law providing that on such charges a member may be expelled by a vote of the society in his absence and without notice is illegal and invalid, it may be laid down as certain that, from the very nature of the plan of mutual assessment insurance, it is proper for mutual benefit societies to provide that non-payment of an assessment within a specified time after notice shall, *ipso facto*, work a forfeiture of the insurance and an expulsion of the defaulting member. It is true that where such stringent clauses of forfeiture are made a part of the contract, they are usually accompanied by provisions for the reinstatement of the delinquent member upon equitable terms, but such provisions are not necessary to the validity of the terms of forfeiture. These societies depend exclusively upon the payment of assessments to meet their losses and expenses, and only by the prompt payment of assessments by their members can they maintain their solvency and responsibility. The only practical way which they have of enforcing payment of their assessments is by forfeiting insurance contracts and expelling the delinquent members for non-payment, and this power is necessary for the existence of such societies. To hold that specific notice to the member must be given of the time and place at which he will be called upon to answer the charge of having failed to pay his assessment within the stipulated time, and that a judicial act of the society, expelling the delinquent member is necessary in order to terminate his rights under the contract, and to hold further that such proceedings may not be waived by express contract of the parties, would be to extend unduly the period of insur-

¹ High Court v. Zak, 136 Ill. 185; 26 N. East. Rep. 593; distinguishing Royal Templars v. Curd, 111 Ill. 284.

ance beyond the time for which a consideration had been paid, would offer encouragement to careless members, and greatly impair the ability of the societies to carry on the work for which they are organized.

While it is competent for a member of a voluntary society to bind himself by an agreement that his membership and insurance shall be forfeited, in case he shall not pay his assessment within a stipulated time, and that such forfeiture shall take effect at the expiration of that time, without special or personal notice to him, and without any act on the part of the society declaring the forfeiture, a construction leading to such a result will not be adopted by the courts unless the intention to waive such notice and judicial act, is clearly expressed in the most unambiguous and explicit language. As observed in *The People v. The Medical Society of the County of Erie*,¹ "the general policy of the law is opposed to sharp and summary judgment, where the party whose rights are in jeopardy has no opportunity to be heard in his own defense." Where the charter of a society provides for strict forfeiture of membership and the benefits arising therefrom, upon the failure of a member to pay his dues or assessment, there is nothing to be done by the society in order to give effect to the failure to pay them. While the conduct of the society may be such as to waive the forfeiture, the forfeiture takes effect unless it is waived. Under a law of a mutual benefit society, which makes the non-payment of assessments for a given period of time after notice operate as an expulsion, *ipso facto*, of the delinquent member and a forfeiture of his rights in the benefit fund, it is not necessary that the expulsion and forfeiture should be judicially determined by any judicatory of the society. Where the by-laws of a society provide that each member shall, within thirty days after notification, pay the secretary the amount of the assessment, and that if any member shall neglect to pay any assessment within that time, "then and in such case such membership shall cease and determine at once without notice, and all claims be forfeited to the association," the neglect to pay an assessment for thirty days after notice thereof, *ipso facto*, determines the membership of the delinquent.²

¹ 32 N. Y. 187.

238; *McDonald v. Ross-Lewin*, 29

² *Pendleton v. Ins. Co.*, 5 Fed. Rep. Hun (N. Y.) 87; *Backdahl v. Grand*

Where the charter of a society provides that on non-payment of an assessment the officers may forfeit the contract of insurance, the society may provide that such non-payment within a certain time shall work a forfeiture; and in case such a provision is inserted in the contract, no action of the officers will be necessary to terminate the rights of the member.¹ A provision in a certificate of membership that, upon failure to pay an assessment within thirty days from the date of the notice, it shall be void, can not, in the absence of qualifying expressions, be construed to render it voidable, at the option of the society. In such a case there is nothing to construe, and the parties will be taken to have meant what they said. There must be some other language in the certificate, or articles of incorporation, or by-laws of the society, which bears materially upon the subject, or which qualifies or restrains the meaning of the word "void" as used in the certificate, in order that it shall be construed to mean "voidable" merely, at the election of the society.² Where a certificate stipulates that if assessments shall not be paid at certain times, and within the lifetime of the member, the contract shall cease and determine, the death of the member while in default of payment terminates the contract, and no formal forfeiture is required.³ Where it is provided in the contract that "any member failing to pay such assessment within thirty days from date of notice shall stand suspended, and shall not thereafter be entitled to the benefits of the mutual aid fund until he has been reinstated according to the laws of the order," no act on the part of the society declaring the suspension is necessary.⁴

§ 290. A contract provided that any member who should violate his pledge of total abstinence from intoxicating liquors should be by the very act suspended from membership in the

Lodge, 46 Minn. 61; 48 N. W. Rep.

454; Scheufler v. Grand Lodge, 45

Minn. 256; 47 N. W. Rep. 799; Yoe v. Association, 63 Md. 86.

¹ Equitable Ins. Co. v. McLennon, 6 Ins. L. J. 124; but see Olmstead v. Farmers' Mutual, 50 Mich. 200, which is distinguishable from this case.

² Bosworth v. Western Mutual, 75 Iowa 582; 39 N. W. Rep. 903.

³ Lantz v. Ins. Co., 139 Pa. St. 546; 21 Atl. Rep. 80.

⁴ Illinois Order v. Besterfield, 37 Ill. App. 522; Hansen v. Supreme Lodge, 40 Ill. App. 216; Supreme Lodge v. Keener (Texas), 25 S. W. Rep. 1084; distinguishing Supreme Lodge v. Wickser, 72 Texas 257; 12 S. W. Rep.

society, and it was held that the drinking of whisky by a member was a self-executing suspension of membership, which took away his good standing and precluded a recovery on his certificate of insurance after his death.¹

The beneficiary of a member who, at the time of his death, stood suspended for non-payment of assessments by operation of the laws of the society, can not recover on the benefit certificate on the ground that a subordinate lodge of the society, of which he was a member, had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge for which it had extended him credit.² Where the by-laws of a society provide that, in case of failure or neglect of a member to pay an assessment within a stipulated time, "his name shall be erased from the roll of members, and he shall forfeit all claims upon the association," and a member does not pay within the time limited, he at once ceases to be a member and forfeits all claim upon the society by operation of the by-law.³ Where the laws of a society provide that, if a member neglects or refuses to pay an assessment within a specified time, he shall cease to be a member, and the secretary shall strike his name from the roll, such laws are self-executing, and the member so omitting to pay loses his right as a member, although the secretary does not strike his name from the roll.⁴ The provision in the charter of a mutual benefit society, that, "any member failing to pay his annual due or assessment within thirty days after notice has been served on him, or sent to him, shall forfeit his membership and all benefits arising therefrom" is not self-executing in the sense that the failure to pay is equivalent to a formal withdrawal or resignation at the expiration of the thirty days next after notice to pay an assessment and a sev-

¹ *Royal Templars v. Curd*, 111 Ill. 284; *Smith v. Knights of Father Mathew*, 36 Mo. App. 184; *Hogins v. Supreme Council*, 76 Cal. 109; 18 Pac. Rep. 125.

² *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127. In this case the dues payable to the supreme lodge, the mutual benefit society, were for insurance purposes, while those payable to the subordinate lodge were

for local expenses; and the dues to the supreme lodge were not paid by the subordinate lodge for the deceased member.

³ *Yoe v. Association*, 63 Md. 86.

⁴ *Rood v. Association*, 31 Fed. Rep. 62; *Gunther v. Association*, 40 La. Ann. 777; 5 So. Rep. 65; *Maginnis' Estate v. Association*, 43 La. Ann. 1136; 10 So. Rep. 180.

erance of all relations between the member and the society, which precludes a waiver of the forfeiture. In such a case, the society may waive the forfeiture.¹

Where a certificate of membership in a society requires the member to pay all assessments against him within ten days after notice thereof, or the certificate shall be null and void, and the by-laws of the society provide that a member failing to pay his assessments within ten days after notice shall forfeit his membership and all benefits therefrom, and a member in his application for membership agreed to be bound by the rules and regulations of the society, a failure or a neglect to pay an assessment within ten days after notice of the same will prevent any recovery upon the certificate after his death.² Where a certificate of membership provides that the benefit fund shall be paid to the beneficiary, in case of the member's death, on condition "that he has complied with the by-laws of the society," and the by-laws provide that members shall forfeit their membership if they fail to pay their assessments within thirty days after publication of notice, and where it appears from the evidence that the assured had failed to pay an assessment within the time specified, and that it remained unpaid at the time of his death, the assured has forfeited his membership, and the beneficiary can not recover under his certificate.³ In a certificate the member agreed "to make a deposit of twelve dollars (two assessments), and renew the same when said deposit has been consumed within thirty days from date of written notice, deposited in the postoffice, in the city of New Orleans, state of Louisiana, addressed in conformity with his written address, filed with the secretary of the association." After the death of the member, an action was brought on the contract of insurance, and the testimony of the secretary and treasurer clearly established the fact that notices were sent through the postoffice, according to the terms of the agreement, informing the deceased member of the consumption of his deposit, and calling on him to renew the same, and that the member

¹ American Mutual v. Quire (Ky.), 8 Ky. L. Rep. 101; Johnson v. Southern Mutual, 79 Ky. 404. ³ Madeira v. Society, 16 Fed. Rep. 749.

² Benevolent Society v. Baldwin, 86 Ill. 479.

failed to renew the deposit, within thirty days from date of written notice. Upon these facts the court held that the failure to renew the deposit in accordance with the contract forfeited the "good standing" of the member in the society, and constituted a sufficient defense to the action.¹

In *McMurray v. Supreme Lodge*,² it was held that "good standing," within the meaning of the laws of the Knights of Honor, implies a full and fair compliance with those laws, in the payment of assessments and dues; that a member who is largely in arrears for assessments and dues, is not "in good standing," within the meaning of his benefit certificate, and if he die, when so in arrears, his beneficiary is not entitled to the payment of the benefit. Decision No. 20, made by the supreme dictator of the Knights of Honor in 1879, held that, if a member fails to pay an assessment, within thirty days allowed by the constitution, and dies between the expiration of the thirty days and the next meeting of the lodge, his family or heirs would be entitled to the death benefit; that a member must be suspended in order to forfeit his death benefit, and can not be suspended after his death. In *McMurray v. Supreme Lodge*, *supra*, the court held that this decision did not apply where the death of the delinquent member took place after the next meeting of his lodge; that the assured, having been in arrears for eight assessments at the time of his death, was not in good standing, and that his beneficiary could not recover. This decision seems to be contrary to the principles governing the forfeiture of rights of membership. According to the decided weight of authority, some act of the society, judicially declaring the forfeiture, was necessary under the contract. The contract provides, as such contracts usually do, that certain benefits will be paid to the beneficiary of the member, "providing he is in good standing when he dies." The laws of the order contain the following provisions upon the payment of dues, assessments, etc.: "Any member who may become in arrears for dues or fines to this lodge shall not be entitled to vote, hold office, nor shall he be entitled to benefits; and when six months in arrears for dues or fines, or when he fails to comply with section 3 of law XV, he shall be suspended from the

¹ *Ziegler v. Ins. Co.*, 1 *McGloin* 20 Fed. Rep. 107.
(La.) 284.

lodge." Law XV, Sec. 3: "Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days, shall be suspended from his lodge." Under the authorities cited in the preceding paragraphs, notice to the member, and a declaration of forfeiture for the non-payment of assessments were necessary to terminate the "good standing" of a delinquent member.

§ 291. **Restoration after suspension or forfeiture for non-payment.**¹—When a society is composed of one grand or central body, and many subordinate and local councils or lodges, these local organizations must, for most purposes, be regarded as the representatives and agents of the society, not of the members insured by it. And although a local council is bound to conform all of its proceedings to the requirements of the constitution and by-laws of the society, yet the insured member is not to be held responsible for such irregularities of procedure, as the local council may commit in adjudicating or determining upon his rights under the contract of insurance. When a local council is authorized by the constitution and by-laws of a society to receive and pass upon applications for restoration or re-admission to membership in the society, and when, acting upon such authority, such council does consider and adjudicate upon an application for restoration or re-admission, restores or re-admits the applicant, and afterward supplements this action by renewing its calls upon the restored or re-admitted member for assessments and by accepting such assessments, these acts of the society constitute an estoppel, prohibiting the society from denying the legality of the member's restoration or re-admission and subjection to new assessments. It can not with plausibility or any degree of liberality be contended that the local council of the society is bound, at the peril of a member who has been suspended, or who has forfeited his membership, to conduct its proceedings for his restoration or re-admission strictly in accordance with the manner prescribed in the constitution and by-laws of the society; that if it fail strictly to observe the routine thus prescribed, the suspended or dropped member is responsible for the irreg-

¹ See § 162a.

ularity; and that, if the local council varies at all, in its proceedings for restoration or re-admission, from the details of procedure set forth in the constitution and by-laws, then, the restoration or re-admission shall be null and void.¹

By the rules of a society, if a member fail to pay his assessment on or before the tenth day of the following month after notice, he shall stand suspended from all rights and privileges in the society from that time. He may, however, within three months, make application in writing signed by him for restoration, to be presented at a meeting of his lodge, accompanied by a sum equal to all his dues and assessments, and be restored by a majority vote of the members of his lodge present at such meeting. A member was in default for not paying two assessments on or before August 10, 1885, and he was suspended by his lodge on August 15, and so reported to the grand lodge of the society. On September 5, his lodge passed a resolution that he be restored on payment of the dues and assessments charged against him. On September 20, he caused the full amount of his dues and assessments up to that date to be paid to his lodge, and died on the following day. The society refused to pay the fund to his beneficiary, because he had not presented to his lodge an application in writing signed by him, etc. In passing upon this question, the supreme court of New York said: "This (the formality prescribed) has relation only to the manner of bringing his case before the meeting of the lodge. Its purpose evidently is to require action to be taken. Without such application the duty would not be imposed upon it to act in the matter. But the lodge, having the power to restore him to his relation of member, might, it would seem, do it without the formality of a written application, as it would contain nothing essentially relating to the inquiry whether or not he should be reinstated. It may be that the subordinate lodge may not waive the observance of any regulation of the grand lodge, which in its nature or effect is substantial. But those things which are merely formal and incidental to the exercise of the power vested in the subordinate lodge may not require strict observance to render its action effectual. To that extent

¹ Hoffman v. Supreme Council, 35 Nelly v. Association, 58 Conn. 552; 20 Fed. Rep. 252; 2 Herman on Estop- Atl. Rep. 671; Chase v. Cheney, 58 Pel, Sec. 1214 and cases cited; Con- Ill. 509.

waiver is incident to the exercise of power possessed in support of action taken." The court held that, upon complying with the requirements of the resolution of the lodge, the member became again entitled to the enjoyment of all his rights, as such, and that, upon his death, his beneficiary was entitled to the fund.¹

But the society may refuse to recognize or pass upon an application for reinstatement to membership where the applicant has not complied with the reasonable by-laws governing the reinstatement of suspended members. The widow of a deceased member sued a mutual benefit society for the benefit fund. It was proved in defense that the member had been regularly suspended for non-payment of assessments; that the by-laws of the society required that a member so suspended should be reinstated within six months, provided he appeared in person, or applied in writing, and paid up all dues to date of re-admission; that within said time deceased had sent the money to pay up his dues, but that it had not been accepted by defendant, and that deceased had never appeared in person, or applied in writing for his reinstatement as a member. It was held that the defense was sufficient. The society was not obliged to accept the money sent by the member as long as he did not appear in person, or apply in writing. He was required to do one or the other in addition to the payment of his dues to terminate his suspension and secure his re-admission. The court had no power to relieve the member from the observance of this condition, and his suspension, therefore, continued to the period of his decease, and necessarily forfeited all his rights and privileges as a member of the society, except that of being reinstated upon complying with the by-laws. The membership of the deceased was subject to the operation and effect of the by-laws of the society, and as they were reasonable, it was the duty of the court to protect the corporation in enforcing them.²

§ 292. Where the suspended member applied for reinstatement and his medical certificate stated that he was of the

¹ Gaige v. Grand Lodge, 15 N. Y. Supreme Assembly, 153 Mass. 83; 26 St. Reporter, 455; 48 Hun 137. N. East. Rep. 236; Supreme Council

² Lehman v. I. O. B'nai Brith, 23 v. Connema, 3 Oh. Cir. Ct. 130; N. Y. Weekly Dig. 409; see Wells v. Grand Lodge v. Jesse, 50 Ill. App. Society, 17 Ontario 317; Lyon v. 101.

same age as shown by a certificate given more than a year prior, and, on objection to the certificate, the society and the applicant agreed that no further action should be taken until inquiry could be made as to his age, and he died before the ballot was taken in the society as provided in the by-laws, he was not at the time of his death restored to membership or in good standing.¹

Where a member had been suspended for non-payment of an assessment, and he had neglected during his lifetime to secure his reinstatement in accordance with the terms of his certificate by paying arrearages while in good health and within a certain time, his restoration to membership can not be effected after his death by payment by another person within the time limited of the sum due from him at the time of his death.² The constitution of a society provided for the reinstatement of a member who had been suspended for non-payment of an assessment, on his making a written application, and on his paying arrears of dues and assessments, if a majority of the ballots cast on the vote to be taken by the members of his lodge on the question were in favor of his reinstatement. After default and suspension the insured paid his assessment, but the collector received it under protest. The formal paper requesting reinstatement was demanded of him, and no vote was taken by his lodge. The supreme secretary wrote him that his lodge could not reinstate him without a medical examination, and, on this letter, his name was dropped from the roll of members. It was held that the ruling of the supreme secretary was not in accordance with the laws of the society, and that the suspended member had been deprived of a right to a ballot and to reinstatement, without good cause.³ This condition in respect to good health was not in the rule, and the officers had no right to add it to the rule.⁴

¹ Supreme Council v. Connema, 733; see Harvey v. Grand Lodge, 50 *supra*; see Taylor v. Grand Lodge, Mo. App. 472.
29 N. Y. Supp. 773.

³ Ingram v. Supreme Council, 14

² Modern Woodmen v. Jameson N. Y. St. Reporter 600.

(Kansas), 29 Pac. Rep. 473. On a re-hearing of this case the court held N. Y. 496; 14 N. Y. St. Reporter 605; that the member had not in fact been suspended. See also Van Houten v. Pine, 38 N. J. 48 Kan. 718; 30 Pac. Eq. 72.

Rep. 460; 49 Kans. 677; 31 Pac. Rep.

The society is not the ultimate judge of the sufficiency of a certificate of health, and where such a certificate is presented and rejected as insufficient by the officers of the society, the courts will, nevertheless, examine it and pass upon its sufficiency. The right to reinstatement upon a certificate depends upon its sufficiency in fact.¹ Unless it is otherwise stipulated in the contract, the right of a member to reinstatement is to be determined on the facts as they existed when the application was made or sent to the society, irrespective of subsequent events. Thus certain by-laws provided that within six months after a forfeiture, the defaulting member might be reinstated by paying all arrearages, and furnishing a satisfactory certificate of health. After the assessment for which a forfeiture was claimed, several notices of subsequent assessments were sent to the assured, each accompanied by a reinstatement contract for her to sign. She received the last of these notices on January 27th, and on February 12th she signed the application for reinstatement, inclosed it, together with money for all arrearages, and a certificate showing her health to be as good as when she first entered the association, and carried the package to the postoffice. While doing so she caught a cold, and died the next day. The company received the package the day after her death, and after knowledge thereof, returned it to her address. It was held that her death was not a good cause for rejecting her application for reinstatement, since her right to reinstatement accrued, if at all, when the application was mailed to the society.²

§ 293. When a member has done all that he is required to do, under the contract of insurance, to entitle him to restoration to membership or to a vote upon the question of his restoration he may not arbitrarily be refused re-admission. The courts will protect his rights during his life, and those of his beneficiary after his death. The by-laws of a society provided that a member who should fail to pay an assessment should be suspended, but that a payment within three months should reinstate him. Another article of the by-laws provided for

¹ Miesell v. Ins. Co., 76 N. Y. 115; ² Jackson v. Association, 78 Wis. Jackson v. Association, 78 Wis. 463; 463; 47 N. W. Rep. 733; see Marck v. 47 N. W. Rep. 733; Van Houten v. Supreme Lodge, 29 Fed. Rep. 896. Pine, *supra*.

the action of the society in cases where members delinquent for more than three months should desire to pay arrearages and obtain restoration of their rights. A member delinquent for less than three months, paid an assessment while on his death bed, and it was held that his rights were thus restored without action on the part of the society.¹ If the laws governing a society do not impose other conditions of reinstatement than the payment of the money due, that is to say, if they do not require a certificate of good health, or a re-election, an acceptance by the society of the money due will operate as a reinstatement of the delinquent member.² The by-laws of a society provided that a member failing to pay an assessment within thirty days should be suspended by his council at its next meeting; that any member so delinquent should forfeit all rights to benefits under the relief fund laws, should be reported suspended by the secretary to the supreme treasurer, and should stand so suspended until payment of arrearages and compliance with the other laws governing reinstatements. It was held that compliance with "the other laws governing reinstatements," which required a certificate of good health and a re-election was not necessary where no suspension had been declared by the council.³ Where the by-laws provide for reinstatement of a delinquent member, if he is in good health, the society may not refuse to reinstate him while in good health because he has passed the age at which it would insure him, and such a refusal is a breach of the contract, for which he may recover.⁴

A certificate provided that any member who had forfeited his contract of insurance might be again restored, at any time within six months, by furnishing proofs of good health and paying the full amount of arrears. In an action on the certificate, the defense of the society was, as to all but \$168.78, that, at the time of the reinstatement of the member, the beneficiary

¹ *Manson v. Grand Lodge*, 30 Minn. 509; *McDonald v. Supreme Council* 78 Cal. 49; 20 Pac. Rep. 41; *Millard v. Supreme Council*, 81 Cal. 340; 22 Pac. Rep. 864.

² *McDonald v. Supreme Council Order of Chosen Friends*, 78 Cal. 49; 20 Pac. Rep. 41.

³ *McDonald v. Supreme Council*, *supra*.

⁴ *Lovick v. Association*, 110 N. C. 93; 14 S. E. Rep. 506. In this case the court gave judgment for the aggregate sum of the assessments paid with interest.

had stipulated that, if his death should take place within sixty days from that date, she should be entitled only to the money actually paid by him on assessments; that as he had died within sixty days after the date of his reinstatement, she was only entitled to the amount of such paid assessments, to wit, \$168.78. The court said: "This was a mere *nudum pactum*. To effect a reinstatement, no consent on the part of the society was necessary. Only two things were required, viz., furnishing a certificate of the good health of the assured, and the payment of arrears. These were done, and thereupon the association was bound under its contract to reinstate him, and had no right to impose any other condition. Neither the promise to do a thing, nor the actual doing of it, will be a good consideration, if it is a thing which the party is bound to do by a subsisting contract with the other party, at least unless done as a compromise of a *bona fide* dispute with reference to the obligations or rights of the parties under the contract, of which there is no claim in this case."¹

A notification to a member that his contract had lapsed, but that the society would reinstate him if he would remit his check for a specified amount, does not make the reinstatement depend on the receipt and payment of the check, but such reinstatement becomes complete by the mailing of the letter containing the check on the day the notification was received; hence, the member may recover benefits for accidental injuries sustained by him while the letter was in transit, and before it reached the society.²

§ 294. Reinstatement to membership in a mutual benefit society, effected by concealment of the fact that the suspended member was dying, is fraudulent and void.³ The contract of insurance is essentially one of good faith, and a reinstatement obtained by false and fraudulent representations does not bind the society. The fact that, after the reinstatement of a member on his false representations, his subordinate lodge allowed him sick benefits under its by-laws and paid his assessments for him, does not preclude the society from setting up the defense

¹ Davidson v. Society, 39 Minn. 303; ³ Marshall v. Accident Co., 11 N. Y. 39 N. W. Rep. 803. Supp. 700.

² Calvin v. Association, 21 N. Y. Supp. 734; see Tayloe v. Ins. Co., 9 How. 390.

of fraud in obtaining reinstatement, when it had no knowledge of the fraud.¹

By reinstating a suspended member with full knowledge of the untruthfulness of his answers in his application for membership, a mutual benefit society waives the benefit of a condition of forfeiture in the policy.² Restoration to membership is not the making of a new contract, but is simply the cancellation of the forfeiture whereby the person is restored to membership under the original contract and with his original rights.³

One who is no longer recognized by the society as a continuing member does not, by merely applying for reinstatement, waive such rights as he may in fact have as a member. He may in any controversy with it attempt to avoid litigation, and his application will be considered as an attempt to have his rights recognized by the society. The question is whether his rights have been forfeited. This will depend upon the facts of the case and the contract of the parties, not upon the act of one of the parties in attempting to adjust the controversy.⁴ But where the petition for reinstatement recites that he has been suspended for non-payment of a certain assessment, and asks that he be reinstated under certain by-laws which provide for the restoration of delinquent members, the petition is evidence of a waiver of any formal defects in the notice of that assessment.⁵

It is the duty of a person who has been expelled from a society, or whose contract of insurance is no longer recognized by the society to be in force, and who claims that he is still a member and entitled to the benefits of membership, to disaffirm the act of expulsion or the forfeiture within a reasonable time, and in some appropriate and distinct manner, under the circumstances of the case, and this is true even when the expulsion is null and void, and when the forfeiture is without any good foundation. The rights of a member of a mutual

¹ Grand Lodge v. Cressey, 47 Ill. App. 616.

² Hoffman v. Supreme Council, *supra*.

³ See § 162a.

⁴ Mutual Reserve v. Hamlin, 139 U. S. 297; 11 Sup. Ct. Rep. 614; Dodge v. Freedman's Co., 93 U. S. 379; La-

rensky v. Supreme Lodge K. of H., 31 Fed. Rep. 592; 1 Greenl. Ev. at section 171. As to declarations and admissions of a member, see § 325.

⁵ Hansen v. Supreme Lodge, 140

Ill. 301; 29 N. East. Rep. 1121; Grand Lodge v. Cressey, 47 Ill. App. 616.

benefit society rest merely in contract, and hence, his expulsion or the forfeiture of his contract of insurance is no more than the breach of a contract, and although void for want of jurisdiction, or for want of proper foundation in fact, it is no more than an act which is void in the sense of being voidable at the election of the member. He may, at his election, affirm or disaffirm it. Where he takes no steps of any kind to secure his reinstatement, permits dues to remain unpaid which had accrued and were payable prior to the date of his expulsion, does not tender them, or any which accrue subsequently, and does not pay or tender subsequent assessments of which he had notice, he must be taken to have acquiesced in and consented to the sentence of expulsion or the asserted forfeiture of his contract, and no recovery may be had for benefits dependent upon his continued membership.¹ But where, as in one case,² he resists the expulsion, though without appeal, and fails for a year to pay subsequent dues which were not demanded of him, it may be regarded that he has sufficiently manifested his disaffirmance of the sentence of expulsion; and where, as in another case,³ he continues to tender all dues when payable, this is clearly so.

§ 295. **Excuse for non-payment, insanity, act of God.**—Where there is no provision of the contract of insurance, which declares either expressly or by necessary implication that sickness, insanity or similar incapacity shall excuse the non-payment of an assessment on the day it is due, the courts can not grant relief against such contingencies.⁴ As we have seen,⁵ the payment of an assessment is not a personal service, but may be made by any person on behalf of the insured. It may be made, even though the insured know nothing about it or be incapable of knowing anything. It may not, therefore, be said that his incapacity makes payment impossible. Courts will sometimes relieve against absolute impossibilities, as where the subject-matter of a contract is destroyed without the fault of the party asking for relief, but they will not

¹ *Gardon v. Supreme Lodge*, 5 Mo. App. 45; see § 58.

² *Mulroy v. Supreme Lodge*, 28 Mo. App. 463.

³ *Hoeffner v. Grand Lodge*, 41 Mo. App. 359, 367.

⁴ *Klein v. Ins. Co.*, 104 U. S. 88; *Thompson v. Ins. Co.*, 104 U. S. 252;

Wheeler v. Ins. Co., 82 N. Y. 543; 16 Hun 317; *Carpenter v. Association*, 68 Iowa 453; 27 N. W. Rep. 456.

⁵ § 272.

relieve in cases where ordinary prudence might have averted the calamity. It is the duty of the insured to make known to the proper persons the conditions of his insurance, and to provide for the prompt payment of assessments as they become due.

The case of *Hillyard v. Mutual Benefit Life Insurance Company*,¹ holds that a failure to pay a premium on the day fixed may be excused, if the failure occurred through no fault of the insured, but by the act of the law, or the act of God. But this doctrine is not in harmony with the adjudicated cases upon this subject.² While it is the general rule that sickness, insanity or similar incapacity on the part of the member will not excuse the non-payment of an assessment within the stipulated time, yet the charter, by-laws or certificate of membership may contain provisions qualifying the rule, although not stating the qualification in express language bearing upon that point. Thus, a rule of a society forfeiting the contract of insurance for non-payment of an assessment within thirty days after mailing of notice also provided that "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment) he (the defaulting member) may be reinstated by paying the amount of arrearages." On February 12, 1886, the deceased received notice of an assessment to be paid on or before March 15th. On March 8th, while apparently in good health, he was suddenly stricken with apoplexy, rendering him immediately speechless and insensible. He never regained consciousness, and died on March 19th without having paid the assessment. It was held that his sudden illness did not excuse the non-performance of the condition of the contract, but that, by reason of the law of the society providing for the reinstatement of a member "for valid reasons to the officers of the association," it was a question of fact for the jury, whether the excuse was sufficient, and that the right of the decedent to have that question determined by a jury passed to his beneficiary upon his death.³

¹ 25 N. J. Law 415.

Ill. App. 101; see Bliss on Life In-

² *Hawkshaw v. Supreme Lodge*, 29 Fed. Rep. 770; *Yoe v. Benevolent Association*, 63 Md. 86; *Ingram v. Supreme Council*, 14 N. Y. St. Re-

urance at section 179; see also *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276.

³ *Dennis v. Association*, 120 N. Y. 496; 24 N. East. Rep. 843; affirming *porter* 600; *Grand Lodge v. Jesse*, 50

§ 296. **Excuse for non-payment, Sunday, holiday.**—If the time for the payment of an assessment expires on Sunday, at noon, and the member dies on Sunday afternoon, the society is liable, since the assessment is not payable until the following Monday.¹ A contract of insurance provided: "This policy will not be considered in force if the premium remains unpaid beyond thirty days after becoming due." The thirty days expired on Sunday and the premium was tendered on Monday.

47 Hun 333; 14 N. Y. St. Reporter, 605. The word "valid" as used above is equivalent to "good," "sufficient" or "satisfactory." The officers may not arbitrarily reject an excuse, under such a provision, but the manner in which they exercise their power under it is open to review in the courts. "That which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." *Miesell v. Ins. Co.*, 76 N. Y. 115; *Boiler Co. v. Garden*, 101 N. Y. 387; 4 N. East. Rep. 749; *Folliard v. Wallace*, 2 Johns. 395; *City of Brooklyn v. R. R. Co.*, 47 N. Y. 475; *Braunstein v. Ins. Co.*, 1 Best & S. 782; *Moore v. Woolsey*, 4 El. & Bl. 243; *Van Houten v. Pine*, 38 N. J. Eq. 72; *Jackson v. Association*, 78 Wis. 463; 47 N. W. Rep. 733.

¹ *Hammond v. American Mutual*, 10 Gray 306; 20 Law Reporter 273; *Howland v. Continental Ins. Co.*, 121 Mass. 499; *Taylor v. Germania Ins. Co.*, 2 Dillon 282; *Sands v. Lyon*, 18 Conn. 69; *Salter v. Burt*, 20 Wend. 205; *Holbrook v. Ins. Co.*, 86 Iowa 255; 53 N. W. Rep. 229. In *Hammond v. American Mutual*, etc., *supra*, it is said: "The only question in the case seems to be whether Sunday is to be excluded as a day of payment, and the payment properly postponed till Monday, or whether the party, to save his policy from being forfeited, must make his quarterly payment on or before Saturday, when

the quarter day falls on Sunday. We have on the one hand the rule as to commercial paper, or negotiable notes payable with grace requiring payment to be made on Saturday where the third day of grace falls on Sunday; and on the other a rule generally adopted as to other contracts to pay money, or perform other specific duties on a certain day named, that if such day falls on Sunday, the day of performance is postponed till Monday. In reference to notes payable on a certain day, but entitled to three days' grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and, therefore, if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from, than to add to, a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business."

The court held that the tender was made in time, and said: "The court is warranted in saying, that when from accident or mutual error, the day of fulfilling an agreement falls upon Sunday, there is enough of principle and authority to justify the party in deferring his performance to the Monday ensuing, without impairing a right or incurring a forfeiture.¹

A statute of Kentucky provides that Thanksgiving day shall be treated as Sunday, as to the presentment, acceptance and protesting of notes and bills. The court of appeals of that state held that this statute did not apply to other business transactions and contracts, and that the payment of an assessment should be made on Thanksgiving day, if so contracted, notwithstanding the statute.² The statutes of the different states must be consulted in order to determine whether a legal holiday will excuse the non-performance of a contract to pay an assessment falling due on that day.

¹ *Campbell v. International Life*, 4 Bosw. 298.

² *National Mutual v. Miller*, 85 Ky. 88; 2 S. W. Rep. 900.

CHAPTER XXI.

ASSESSMENTS.

- § 297. Waiver of forfeiture, agreement of officers, printed prospectus.
298, 299. Waiver of forfeiture, custom of society.
300, 301. Waiver of forfeiture, receipt of assessments, estoppel *in pais*.
302. Waiver of forfeiture, assessments retained by the society.
303, 304. Waiver of forfeiture, conditional acceptance of past due assessments.
305, 306. Waiver of forfeiture, the levy of an assessment on a delinquent member.
307. Waiver of forfeiture, attempt to collect assessments.

§ 297. **Waiver of forfeiture, statements and agreements of officers of the society, printed prospectus of the society.**—Where the officers of a society circulate a pamphlet among its members, stating that thirty days of grace will be given for the payment of dues and assessments, the society is estopped to claim a forfeiture on account of the failure to pay on the day stipulated, where the member relies upon such statement, and fails to pay promptly.¹ Where a member of a mutual benefit society, relying on the promise of its manager to draw on him for assessments, and being misled by the fact that such drafts had been twice made on him, is suspended because of non-payment of an assessment for which no draft was made, and is unable to be reinstated for the reason that his health has become impaired, the society is estopped from insisting upon a forfeiture.² A director of a society called upon a sick member who was insured in the society. The sick member said to him that an assessment was due on the following Friday, that he could send out and borrow the money to pay it, but that he expected some money on the following Monday, and did not like to borrow it. He asked the director to pay the

¹Fowler v. Metropolitan L. Ins. Co., 41 Hun 357; Ruse v. Mutual Co., 24 N. Y. 653; Howell v. Knickerbocker Co., 44 N. Y. 276. ²McCorkle v. Association, 71 Texas 149; 8 S. W. Rep. 516.

assessment for him, promising to repay him on the following Monday. The director assured him that he would pay it for him at once, but neglected to do so, and the society claimed that his rights were forfeited. The court held that the promise of the director was one upon which the member had a right to rely, and that the member should be reinstated.¹

The statement of the secretary of a mutual benefit society to the insured member that he need not pay his dues until certain charges then pending against him, which if true made the policy forfeitable, were disposed of, is one upon which the insured has a right to rely, and will excuse the non-payment of assessments until that time.² The by-laws of an unincorporated mutual benefit society provided that, in case a member for failure to pay an assessment promptly had been dropped from the society by the secretary, the board of directors should have power to reinstate him on his presenting to them a reasonable excuse for such failure, and paying the sum in arrears. A member, being delinquent, appeared before them, and offered a sufficient reason for his delinquency, and the board refused to reinstate him because they alleged his health was precarious. He died very soon afterward. The court after his death, inquired into and determined the adequacy of the reason so offered, and compelled the society to pay the amount of insurance to which such delinquent's widow was entitled.³ A person having notice that an agent with whom he is dealing is acting beyond the scope of his authority, can not hold the principal. The promise of an agent of a mutual benefit society to a member whom he owes, that he will pay such assessment as may be made by the society and become debtor therefor to the society, is of itself notice that the agent is acting outside of his authority; and the society is not bound to accept the agent instead of the member as his debtor unless it, with full knowledge of what the agent has done, affirms or

¹ Van Houten v. Pine, 9 Stew. Eq. 133; 38 N. J. Eq. 72.

² National Mutual v. Jones, 84 Ky. 110; 2 S. W. Rep. 447; Robertson v. Ins. Co., 47 N. Y. Superior Ct. 377; Loughridge v. Association, 84 Iowa 141; 50 N. W. Rep. 568; Mallory v. Ins. Co., 90 Mich. 112; 51 N. W. Rep. 188.

³ Van Houten v. Pine, 38 N. J. Eq. 72; 9 Stew. Eq. 133. The excuse was that a director of the society had promised and assured the member that he himself would pay the assessment due the next Friday, in consideration of the promise of the member to repay him the amount of such assessment on the Monday following.

ratifies it.¹ A printed prospectus is inadmissible to control the terms of a certificate.²

Where a member was misled by the statements of an officer of the society and was by such statements induced to refrain from paying assessments which he otherwise would have paid, his beneficiary is entitled to recover on the contract after his death, upon payment of such assessments and all others which may be due.³

§ 298. **Waiver of forfeiture, custom of the society.**—

While it is sometimes said that custom is never permitted to overcome the express terms of a contract, yet a custom may change the express provisions of a contract, where it has the necessary elements of an estoppel. If a society continually waives a forfeiture, and this fact is known to the public and to the member, it is bound by the custom in that regard. Such a custom must be clearly established, and its uniformity and duration shown. When it is urged that a society in each particular case has waived the prompt payment of the assessment, the question is whether the custom or usage of the society in this respect was so general and usual as to estop it from asserting that there was a forfeiture in the particular case at bar. Isolated instances of waiver of forfeiture are insufficient to prove a custom, and can not be shown to overcome or change the express provisions of the contract of insurance.⁴ Knowledge of the custom on the part of the member must be shown in order to be binding on the society, and where all that was shown in regard to the extent of a member's knowledge that the society waived prompt payment, was that he had paid twenty-three assessments, one five days after maturity, and four from one to three days after maturity, it was held that the evidence did not tend to show that the

¹ Co-operative Association v. McConnico, 53 Miss. 233.

² Ruse v. Ins. Co., 23 N. Y. 516; Mutual Benefit v. Ruse, 8 Ga. 534; Smith v. Ins. Co., 103 Pa. St. 177; Fowler v. Ins. Co., 116 N. Y. 389; Ins. Co. v. Bratt, 55 Md. 200; Union Central v. Cheever, 36 Oh. St. 201; Continental Ins. Co. v. Hamilton, 41 Oh. St. 274; *contra*, see Southern Mutual v. Montague, 84 Ky. 653; Walsh v. Ins. Co.,

30 Iowa 133; Smith v. Ins. Co., 2 Tenn. Ch. 727; Ball v. N. W. Association (Minn.), 57 N. W. Rep. 103.

³ Colby v. Life Indemnity Co. (Minn.), 59 N. W. Rep. 539.

⁴ Willcut v. N. W. Mutual, 81 Ind. 301; Crossman, Adm'r, v. Mass. Ben., 143 Mass. 435; 9 N. E. Rep. 753; Ill. Masons' Benevolent Soc. v. Baldwin, 86 Ill. 479.

member had had knowledge of any custom of the society in that respect.¹

The by-laws of a society provided for payment of assessments within thirty days after proper notice, and, in default thereof, for forfeiture of the rights of membership. A member failed to pay an assessment and died. In a suit on the certificate, it was shown that it was the custom of the society, if a member failed to pay his assessment after one notice, to give him a second one, requiring him to pay within ten days, and that the deceased member had not been given a second notice. The evidence did not establish any knowledge of such a custom on the part of the deceased and was held insufficient.² While a custom may not be urged to affect the terms of a contract to the extent of enlarging or abridging it, yet it may interpret it.³

Where it is shown that a large number of assessments on members were accepted by a society after they were due, and it is claimed that a waiver of forfeiture should be implied therefrom, but no practice is shown of receiving past due assessments from sick members, such waiver does not extend to a member who was sick at the time his past due assessment was tendered to the society.⁴ In an action on a certificate on which the society denies liability because of the non-payment of an assessment, evidence is inadmissible that it was defendant's custom to reinstate members on payment of delinquent assessments, as a matter of course, if no other charges were preferred against them.⁵ In a suit upon a certificate of insurance it was held that, even though a custom of leniency to its members in receiving assessments after the stipulated time, were thoroughly established, there was nothing in such a custom which would prohibit either an inquiry by the society as to the health of the member who desired to take advan-

¹ *Bosworth v. Western Mutual*, 75 Iowa 582; 39 N. W. Rep. 903; *Mars-ton v. Ins. Co.*, 59 N. H. 92; *Gaterman v. Ins. Co.*, 1 Mo. App. 300; 434.

Lantz v. Ins. Co., 139 Pa. St. 546; ² *Rapp v. Palmer*, 3 Watts 178.

20 Atl. Rep. 80; *McGowan v. Association*, 28 N. Y. Supp. 177. ⁴ *Schmidt v. Modern Woodmen*, 84 Wis. 101; 54 N. W. Rep. 264.

³ *National Mutual v. Jones*, 84 Ky. 110; 2 S. W. Rep. 447; *Schwarz v. Dickinson v. Grand Lodge (Pa. St.)*, 28 Atl. Rep. 293.

tage of the custom, or the refusal of the money when tendered, if the health of the applicant was so impaired as to increase the risk.¹ But in *Stylov v. Wisconsin Odd Fellows*,² the language of the court might be construed as favoring the opposite doctrine. In that case, the by-laws of the society provided that membership should be forfeited by failure to pay an assessment within sixty days after notice, but that reinstatement might be had, the company reserving the right to exact a physician's certificate of good health. In an action on a certificate issued by the society, it was shown that at the death of the member holding the certificate, sixty-seven assessments had been made against him. Of these the last three had not been paid—Nos. 17, 18 and 19. The evidence disclosed the fact that the society made assessment No. 19 against the deceased two days after he was in default for assessment No. 17, for the non-payment of which the society claimed he forfeited all rights under his contract with the society. Of the remaining sixty-four but one assessment had been paid within the sixty days and all payments had been received without demand for a physician's certificate, though some payments were made one hundred days late. The court said: "The assured had every reason to believe that the company would accept the payment of these assessments as it accepted the payment of all others, within a reasonable time after they became due, without making any question as to his state of health. * * We are of opinion that after the constant course of conduct of the company with the assured, as shown by the evidence in this case, the only way the company could insist upon a forfeiture for non-payment within the time fixed by the by-laws would be by giving the assured personal notice that thereafter punctual payment would be required."³ Where a certificate provided that it should be void if an assessment were not paid within ten days after due notice, but it appeared that the society had been accustomed for two years to receive payments from the member if made within

¹ *National Mutual v. Miller*, 85 Ky. 88; 2 S. W. Rep. 900; see also *Lewis v. Phoenix Mutual*, 44 Conn. 72; *Mutual Life v. Ins. Co.*, 100 Pa. St. 172; *Crossman v. Association*, 143 Mass. 435; 9 N. East. Rep. 753.

² 69 Wis. 224; 34 N. W. Rep. 151.

³ See *Insurance Co. v. Hinesley*, 75 Ind. 1.

sixty days from the time he received the notice, and the certificate remained uncanceled at the death of the member within that time, the society was estopped to claim a forfeiture for non-payment of an assessment within the ten days.¹

Where a contract provides for a forfeiture unless an assessment is paid by a certain time, but the society has accepted payment of more than half of such assessments after they were due, without warning of any possible forfeiture in the future, if the last assessment be paid or tendered within the same time after maturity as the majority of the previous ones, the society is estopped from asserting a forfeiture, though the insured died before it was paid or tendered.² A general practice and course of business which will naturally lead a member to rely upon the acceptance of payment for assessments, after failure to pay in the time prescribed by the policy, will operate as a waiver of the forfeiture. Insurance companies can not lead customers to rely upon their usages, course of business, and the declarations of their officers, which disarm vigilance, overcome watchfulness, and remove stimulus to promptness in payments provided by their policies, and then rigidly enforce the conditions of payment. They must give to the customers the indulgence which they thus promise. Forfeitures on account of omissions to pay sums provided by the policies will be regarded as waived by such usages, course of business, and declarations of officers.³

§ 299. Where the uniform custom of the society has been to give notice of the time when assessments fall due, and to collect the same at the residence of the member through a local agent residing in his neighborhood, good faith requires

¹ *Odd Fellows' Mutual v. Sweetser*, Rep. 443; *Pittsburgh Boat-Yard Co. v. Western Assur. Co.*, 118 Pa. St. 117 Ind. 97; 19 N. East. Rep. 722.

² *Spoeri v. Ins. Co.*, 39 Fed. Rep. 415; 11 Atl. Rep. 801; *Tripp v. Insurance Co.*, 55 Vt. 100; *Marston v. Insurance Co.*, 59 N. H. 92; *Insurance App.* 608; *Bouton v. Ins. Co.*, 25 Conn. Co. v. Lester, 62 Ga. 247; *Insurance* 542; *Illinois Ins. Co. v. Stanton*, 57 Co. v. Garmany, 74 Ga. 51; *Thompson* Ill. 354; *White v. Ins. Co.*, 120 Mass. son v. Insurance Co., 52 Mo. 469; *Insurance* 330; *Meyer v. Ins. Co.*, 51 How. 267; *Insurance Co. v. Scheidle*, 18 Neb. 495; *Alabama Gold Ins. Co. v. Garmany*, 25 N. W. Rep. 620; *Loughridge v. Association*, 84 Iowa, 141; 50 N. W. 74 Ga. 51.

³ *Mayer v. Insurance Co.*, 38 Iowa, Rep. 568; but see *Richardson v. Ins.* 304; *Unsell v. Insurance Co.*, 32 Fed. Co. (Ky.), 18 S. W. Rep. 165.

that this mode of collecting should not be discontinued, and payment required at the office of the society, without notice to the insured.¹ But it has been held that where the exact time of payment is fixed by the contract, and the society has been accustomed to notify the insured in advance of that date, and to urge him to be punctual, it may, nevertheless, cease to give such notice at any time, without informing him that such notice will no longer be given.² If the practice of a society and its course of dealing with its members, known to the insured, have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event, will not be insisted on, the society will not be permitted to set up such forfeiture, as against one in whom their conduct has induced such belief.³ Where a party to a contract, who is entitled to a forfeiture in case of the non-performance by the other party of a condition therein, by his own act induces such other to omit strict performance within the time limited, he can not exact the forfeiture if the party in technical default, with reasonable diligence thereafter, performs or offers to perform the condition.⁴ It is a well settled and salutary rule of law, that a party can not insist upon a condition precedent, when its non-performance has been caused by himself.⁵ Between August 17, 1883, and February 27, 1885, fifteen assessments were made by a society on a member residing in Watertown, N. Y., and all of them were paid by the member by his sending to the society, at its place of business at Cincinnati, Ohio, by mail,

¹ *Ins. Co. v. Bernard*, 33 Ohio St. Co. v. Eggleston, 96 U. S. 572; *Ins.* 459; *Seamans v. N. W. Mut. Life*, 3 Co. v. Pierce, 75 Ill. 426; *Bradwell v.* Fed. Rep. 325; *Hanley v. Life Ass'n*, Ins. Co., 75 N. C. 8; *Thompson v. Ins.* etc., 69 Mo. 380; *Illinois Ins. Co. v.* Co., 52 Mo. 469.
² *Stanton*, 57 Ill. 354; *Bouton v. Mut.* Life, etc., 25 Conn. 542; *White v.* 247; 25 N. East. Rep. 299; 48 Hun 278; 17 N. Y. St. Rep. 925; *Leslie v.* Conn. Ins. Co., 120 Mass. 330; *Meyer v. Knickerbocker Life*, 51 How. 267; *Ins. Co.*, 63 N. Y. 27; *True v. Association*, 78 Wis. 287; 47 N. W. Rep. 520.

³ *Thompson v. Ins. Co.*, 104 U. S. 252; *Mutual Fire Ins. Co. v. Miller*, 58 Md. 463; *Mandego v. Life Association*, 64 Iowa 134, distinguishing *Phoenix Mut. v. Doster*, 106 U. S. 30.

⁴ *Ins. Co. v. McCain*, 96 U. S. 84; *Ins. Co. v. Wolff*, 95 U. S. 326; *Ins.*

⁵ *Kenyon v. Association*, 122 N. Y. 247; 25 N. East. Rep. 299; 48 Hun 278; 17 N. Y. St. Rep. 925; *Leslie v.* Ins. Co., 63 N. Y. 27; *True v. Association*, 78 Wis. 287; 47 N. W. Rep. 520; *Penn. Mutual v. Keach*, 134 Ill. 583; 26 N. East. Rep. 106; *Thompson v. Ins. Co.*, 52 Mo. 469; *Unsell v. Ins. Co.*, 32 Fed. Rep. 443.

⁶ *Young v. Hunter*, 6 N. Y. 207; *Ins. Co. v. Eggleston*, 96 U. S. 572; *Wyman v. Ins. Co.*, 119 N. Y. 274.

his check on the Watertown National Bank, payable to the order of its secretary. On March 27, 1885, the assessment in question was made. It was for \$4.75. On April 4, 1885, the member sent his check for that sum precisely as he had paid all the former assessments. On April 10, a second notice was sent to him, asking him to remit by check, postal order, or express order, to which he replied that he had paid that assessment April 4, and had the receipt of the society for it. On April 15 the society replied that there must be a mistake somewhere, as its officers had the receipt and could find no trace of having received a remittance for the payment of such assessment, and requested him to return the receipt he held, that they might trace the matter up, promising to return it to him. Before the receipt of this letter the member died. His death was sudden and unexpected. There was a sufficient fund in bank to meet this check. The first notice of assessment requested the member to remit the amount by sight draft on a Cincinnati or New York bank, or by an express money order. On these facts the court held that the member was justified, by the course of dealing between the parties, in regarding the sending of his check as equivalent to sending a draft or order, and that the society was estopped by its acts and course of dealing with him from claiming that such check was not equivalent to a sight draft, at least so far as to prevent it from claiming that the certificate was forfeited by reason of the non-payment of that assessment.¹

The fact that by the charter of a mutual benefit society a particular method of giving notice of assessments as they fall due is declared to be sufficient and binding on all members does not exempt the corporation from the operation of the principles of equitable estoppel, which apply to all other persons, natural or juridical. The charter of a society provided that notices of assessments posted in the rooms of the cotton exchange should be deemed proper notices to all members. Members were required to be members or employes of the exchange, but it was also provided that "any member may withdraw from the cotton exchange without severing his connection with this association," and in course of time a class of

¹ Kenyon v. Association, *supra*.

members arose, who had ceased to be members of the exchange, and had lost the privilege of access to its rooms, and the society adopted the custom of sending by mail written notices of assessments to all such members, and even to others who requested it. A member of the society had ceased to be a member of the exchange, and notices had been sent to him for several years. He failed to receive notice of one assessment, and was thereupon suspended. As soon as the default became known, payment of all assessments due was tendered, and reinstatement demanded, but the society insisted that all his rights were forfeited. It was held that the society was estopped to claim that the member was entitled to no other notice than the posting in the cotton exchange, and the court said: "We can discover no possible reason why the defendant should be exempt from the application of the principles of equitable estoppel which operate upon all other persons, natural and juridical, nor why the mere fact that there was a contract should bar their application. In matters affecting the execution of contracts, there would never be any occasion for invoking the doctrine of estoppel if the party had complied with the terms of his contract, because such compliance would be of itself a sufficient basis for his legal right. It is only when the terms have admittedly not been complied with that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up such non-compliance as a ground of forfeiture. * * There can be no doubt that the long-continued practice of the defendant company to send to (the member) prompt notice of every assessment as soon as made, justified him in believing that he would receive such notices, and in acting on the belief that, by paying when so notified, his rights would be protected."¹ In *Helme v. Phila. Life Ins. Co.*,² plaintiff offered on the trial to prove a custom among life insurance companies, to allow thirty days of grace for payment of premiums, even where a clause of forfeiture for non-payment on a time certain existed, and the court held that the testimony should have been ad-

¹ *Gunther v. N. O. Cotton Exchange Mut. Aid Ass'n*, 40 La. Ann. 443; see § 300; *True v. Association*, 777; 5 Southern Rep. 65, citing *Bigelow on Estoppel*, Introduction, p. 64; ² 61 Pa. St. 107.

mitted.¹ The contrary doctrine has been held in several cases.² A condition in the contract of insurance issued by a mutual benefit society, providing that a failure to comply with the rules of the society as to payments shall render the certificate void, is not waived, as to future payments, by the fact that the officers have reinstated the insured member when he has failed to make payment according to the rules of the society; especially when another rule, which is a part of the contract, permits the officers to so reinstate a member, on payment of arrears, for any valid reason.³

Where unknown to the supreme lodge, a custom had grown up in a subordinate lodge for the latter to pay one assessment for a member, in case he failed to pay it, the custom is not binding on the supreme lodge.⁴

§ 300. **Waiver of forfeiture, receipt of assessments, estoppel in pais.**—The doctrine of estoppel *in pais* is based upon a fraudulent purpose or fraudulent result. If the element of fraud is wanting, there is no estoppel, as where both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception and change of conduct in consequence of it.⁵ The mere act of receiving or collecting assessments by a society with knowledge of an existing right of forfeiture will not estop the society from setting up such forfeiture, unless the member when he paid the assessments had reason fairly to conclude from the acts and declarations of the association that the forfeiture had been or would be waived, or unless the payment was made in a reliance upon the validity of the contract of insurance, induced by the acts, declarations or silence of the society. Thus, in one case⁶ the member informed the company that he had changed his occupation from clerking to braking upon a railroad, and asked what change, if any, was

¹ Ruse v. Mut. Ben., 26 Barb. (N. Y.) 556; 24 N. Y. 653; Mayers v. Ins. Co., 38 Iowa 304; Girard Life v. Mutual Life, 97 Pa. St. 1. ⁴ Grand Lodge v. Jesse, 50 Ill. App. 101.

² Mutual Benefit v. Ruse, 8 Ga. 534; Ill. 329; 10 N. East. Rep. 225; over-Ins. Co. v. Sefton, 53 Ind. 380; Lewis v. Phoenix Mutual, 44 Conn. 72. ⁵ Davidson v. Young, 38 Ill. 152.

⁶ N. W. Mutual v. Amerman, 119 ruling 16 Ill. App. 528.

³ Crossman v. Association, 143 Mass. 435; 9 N. East. Rep. 753.

necessary in his policy. The company informed him by letter that it could not issue a permit for his occupation as brakeman, but advised him, as he did not expect to be in that business long, to pay the premium on his policy, so as to have it in force when he should stop braking, and to take out an accident policy on his life, while in that business. The assured paid the premium, and was killed soon afterward while at work as conductor of a freight train, having been promoted from brakeman to that position. The court held that the doctrine of estoppel was not applicable to the receipt of the premium by the company under these circumstances, and that the company was not liable. Where membership in a mutual benefit society is, by the by-laws, made to depend upon continuance of membership in a particular organization, withdrawal from membership in such organization forfeits all rights in the society; and the subsequent levy and collection of assessments by the society from one who had withdrawn from membership in such organization, does not continue his right of membership in such society. The member is as much bound by the by-laws as the society, and he can not claim a waiver of their requirements.¹ By the constitution of a mutual benefit society, no person could be a member of it unless he was a member of the Improved Order of Red Men, and on failing to pay his dues to the I. O. R. M., he ceased to be a member of the benefit society. The two societies were independent, and had different officers. It was held that the receipt of assessments by the mutual benefit society in ignorance that the person paying them had ceased to be a member of the Red Men by reason of non-payment of dues, was not an acquiescence in, or waiver of the fact that he was not a member in good standing in the society; that to constitute a waiver it should, at least, appear that the officers of the society knew, or had notice of the fact, that the person had ceased to be a member of his tribe when they received his subsequent assessment.² A waiver of a right presupposes a knowledge of the right waived, and is not to be inferred from a merely negligent

¹ *Burbank v. Boston Police Relief Association*, 144 Mass. 434. *ciation*, 5 Cin. Law Bull. 516; *Ellerbe v. Faust* (Mo.), 25 S. W. Rep. 390.

² *Springmier v. Benevolent Asso-*

act, or from one done under a misapprehension of the real condition of the rights of the parties at the time.¹

It has been held in some cases that knowledge on the part of a society that a statement warranted in the application to be true is false and the subsequent collection of assessments will not estop it from insisting upon a forfeiture of the contract for breach of the warranty.² It has also been held that an untrue or fraudulent statement by the member in his application, of a fact material to the risk, will not prevent a recovery, if the society knew the truth in regard to the fact when it issued the contract of insurance and received assessments upon it;³ and it may be broadly laid down as the general rule that where, after discovering that a member has made misrepresentations in his application, a society continues to collect assessments, it thereby waives its right to declare invalid the contract obtained by such misrepresentations.⁴ Knowledge on the part of the society of a breach of one of the conditions of the contract by the member, and the subsequent collection of assessments, is a waiver of the right to forfeit the contract for that cause.⁵ Knowledge on the part of the society and the waiver of the forfeiture must be pleaded to be made available.⁶

If the society accept payment of an assessment after it has

¹ Diehl v. Ins. Co., 58 Pa. St. 443; Ins. Co., 33 La. Ann. 1353; Day v. Leonard v. Lebanon Mutual, 3 W. N. Ins. Co., 1 McArthur 41; Ætna Life C. 527; Lyon v. Supreme Assembly. v. France, 91 U. S. 510; Jeffries v. 153 Mass. 83; 26 N. East. Rep. 236; Ins. Co., 22 Wall. 47; Morrison v. Ins. Wells v. Society, 17 Ontario 317. Co., 59 Wis. 163; 18 N. W. Rep. 13;

² Kenyon v. Association, 122 N. Y. Fitzpatrick v. Ins. Co., 56 Conn. 116. 247; 25 N. East. Rep. 299; Barteau v. ⁵ Insurance Co. v. Hazelett, 105 Ind. Ins. Co., 67 N. Y. 595; Vose v. Ins. 212; 4 N. East. Rep. 582; Newman v. Co., 6 Cush. (Mass.) 42; Smith v. Ins. Association, 76 Iowa 56; Walsh v. Co., 24 Pa. St. 320; Galbraith's Adm'r Ins. Co., 30 Iowa 133; McDonald v. Ins. Co., 12 Bush (Ky.) 29. Supreme Council, 78 Cal. 49; 20

³ Miller v. Ins. Co., 31 Iowa 316. Pac. Rep. 41; Association v. Beck, 77 Ind. 203; Modern Woodmen v. 25 W. Va. 622; Watson v. Association, Jameson, 48 Kan. 718; 30 Pac. Rep. 21 Fed. Rep. 698; Hoffman v. Supreme Council, 35 Fed. Rep. 252; Ball v. Association, 64 N. H. 291; 9 Atl. 460; 31 Pac. Rep. 733; 49 Kan. 677; Daniher v. Grand Lodge (Utah), 37 Pac. Rep. 245.

⁴ Schwarzbach v. Protective Union, ⁶ Schwarzbach v. Protective Union, 25 W. Va. 622; Watson v. Association, supra; Texas Mutual v. Davidge, 51 21 Fed. Rep. 698; Hoffman v. Supreme Council, 35 Fed. Rep. 252; Ball v. Association, 64 N. H. 291; 9 Atl. Rep. 103; Warnebold v. Grand Lodge, 83 Iowa 23; 48 N. W. Rep. 1071; Humphreys v. Association, 139 Pa. St. 264; 20 Atl. Rep. 1047; Campbell v. Ins. Co., 98 Mass. 381; Hartwell v. 455.

notice of a change in the habits of the assured, which by the terms of the policy would cause a forfeiture, it thereby waives the forfeiture.¹ Where it was known to the society that the member was addicted to the use of intoxicating liquors, and it accepted assessments until his death, it can not set up the forfeiture.² The demand and receipt of assessments by a society with full knowledge of the facts is a distinct act of affirmance of the contract by the party entitled to avoid it, and will constitute a waiver of the right to annul it.³ Where a society, which has issued a certificate conditioned that it shall be void, if the beneficiary is not a "natural heir" of the member, continues to collect assessments after knowledge that the beneficiary named is not related to the member, there is a waiver of the condition.⁴ Where the society retains and continues to collect assessments after its secretary has knowledge of a false statement in the application as to the age of the member insured, it waives the forfeiture of the contract.⁵ But when a member has in his application made statements as to his age, and his local lodge has instituted inquiries as to the truth of his statements, the levy and collection of assessments by the secretary of the society in ignorance of the fact that the statements were untrue, do not waive the forfeiture of the contract on account of the false statements.⁶ Where a member of a mutual benefit society has made false statements as to his age in his application for membership, and has never stated his true age, the fact that pending an investigation of the matter

¹ Phoenix Mutual v. Roddin, 120 U. Wall. 404; Ins. Co. v. Stockbower, 26 Pa. St. 183; 7 Sup. Ct. Rep. 500; Lindsey v. Society, 84 Iowa 734; 50 N. W. Rep. 29.

² Grand Lodge v. Brand, 29 Neb. 644; 46 N. W. Rep. 95.

³ Frost v. Saratoga Ins. Co., 5 Denis 516; Viall v. The Genesee Mutual, 19 Barb. 440; Gans v. St. Paul Ins. Co., 43 Wis. 108; Masonic Mutual v. Beck, 77 Ind. 203; Watson v. Centennial Mutual, 21 Fed. Rep. 698. To same effect see Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Phoenix Ins. Co. v. Slaughter, 12

Ins. Co., 52 Me. 336; Viele v. Germania Ins. Co., 26 Iowa 9; May on Ins., section 507; Cotten v. Ins. Co., 41 Fed. Rep. 506.

⁴ Lindsey v. Society, 84 Iowa 734; 50 N. W. Rep. 29.

⁵ Morrison v. Odd Fellows, 59 Wis. 162; see Aetna Life v. Hanna, 81 Texas 487; 17 S. W. Rep. 35; Cotten v. Ins. Co., 41 Fed. Rep. 506; Miller v. Ins. Co., 31 Iowa 216; Coolidge v. Ins. Co., 1 Mo. App. 109.

⁶ Preuster v. Supreme Council, 15 N. Y. Supp. 41.

by the society, which investigation is carried on with reasonable diligence, and results in his expulsion, assessments are levied against and paid by him, does not constitute a waiver of the right to expel him for his false statements, where, up to the time of his expulsion, the society had no legal proof that his age had been falsely stated.¹

In an action on a certificate of membership, the society defended on the ground that the deceased member had stated in his application that he was fifty-nine years of age, when, in fact, he was sixty-four years of age. It was claimed by plaintiff that the society, by its treasurer, had received of plaintiff, after her husband's death, two assessments against him, made just before he died, and that, at that time, the treasurer and some of the other officers had information of his true age. Upon these facts, it was contended that the society had ratified the contract, or was estopped from setting up such defense. The court said: "We think this ground untenable. There is no evidence that the directors had knowledge of Swett's true age, prior to their action rejecting the plaintiff's claim in

¹ *Preuster v. Supreme Council*, 135 N. Y. 417; 32 N. East. Rep. 135; affirming 15 N. Y. Supp. 41. Statements made by a member as to his age. *Ætna Ins. Co. v. France*, 91 U. S. 510; *Linz v. Ins. Co.*, 8 Mo. App. 363; *Alabama Ins. Co. v. Ins. Co.*, 81 Ala. 329; *Swett v. Society*, 78 Me. 541; 7 Atl. Rep. 394; *Gray v. Association*, 111 Ind. 531; 11 N. East. Rep. 477; *Low v. Ins. Co.*, 6 Cin. L. Bull. 666; *Southern Life v. Wilkinson*, 53 Ga. 535; *Vivar v. Supreme Lodge*, 52 N. J. L. 455; 20 Atl. Rep. 36; *Ball v. Association*, 64 N. H. 291; *Hanf v. Association*, 76 Wis. 450; 45 N. W. Rep. 315; *Preuster v. Supreme Council*, 135 N. Y. 417; 32 N. East. Rep. 135; 15 N. Y. Supp. 41; *Mahaney v. Ass'n*, 23 N. Y. Supp. 213; *McCoy v. Ins. Co.*, 152 Mass. 272; 25 N. East. Rep. 289. Member beyond the age limited in the charter or by-laws. *McCoy v. Ins. Co.*, 152 Mass. 272; 25 N. East. Rep. 289; *Morrison v. Odd Fellows*, 59 Wis. 162; *Smith v. Pinch*, 80 Mich. 332; *Luthe v. Ins. Co.*, 55 Wis. 543. Evidence of age of member; his statements made some time before or some time after the issuing of the contract are not admissible. *Valley Mutual v. Teewalt*, 79 Va. 421; *Westropp v. Bruce, Batty (Irish Rep.)* 155. It is improper to permit a witness to give in evidence his opinion of the age of a person from the appearance of the latter. *Valley Mutual v. Teewalt*, *supra*; but see *Mahaney v. Association*, 69 Hun 12; 22 N. Y. Supp. 213. An entry in the minute-book of a lodge of which the deceased was a member made prior to the issue of the certificate and showing his age as recorded by the secretary in the usual manner of keeping its records, is not admissible as evidence of his age; it is mere hearsay. *Conn. Mutual v. Schwenk*, 94 U. S. 593; see *McQuirk v. Mutual Benefit Life*, 20 N. Y. Supp. 908.

July, 1883. Nor is there any evidence that the treasurer or any other officer of the corporation, acquired any knowledge or information of the fact, while in the discharge of any official duty. But assuming that the treasurer acquired notice of the fact when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member, and thereby make a contract of insurance, and, if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any ratification.¹

§ 301. The act of the financial officer of a subordinate lodge, who is not an officer of the supreme lodge, in receiving past due assessments, does not bind the society. To establish a waiver as to such act, knowledge and acquiescence on the part of the managing officers of the supreme or central body must be shown.² The unauthorized acts of the ministerial officers of a subordinate lodge can not operate to dispense with a member's duty to comply with the laws of the supreme lodge in regard to the prompt payment of assessments. A benefit society is not estopped from enforcing a forfeiture of a policy for non-payment of an assessment by the fact that one of its sub-agents, without special authority for the act, accepted payment of the assessment after it was due.³ Where a member falsely states and warrants in his application that the appointed beneficiary is his niece, the society is not estopped from showing that this statement is untrue by the fact that one of its officers who witnessed the application, but was not charged with the duty of ascertaining the qualification of a beneficiary named, had heard before that time that the person so appointed was not the niece of the member, but had no personal knowledge on the subject, and testified that he

¹ Swett v. Society, 78 Me. 541; 7 Life Ins. Co., 2 Lansing 480; Bouton v. American Mutual, 25 Conn. Atl. Rep. 394; see § 97.

² Eaton v. Supreme Lodge, 22 Cent. Law Jour. 560; Painter v. Association, 14 Ins. Law Jour. 556.

³ Illinois Mason's Ben. Soc. v. Baldwin, 86 Ill. 479; Borgraefe v. Supreme Lodge, K. of H., 22 Mo. App. 127; Leonard v. The Lebanon Mutual, 3 Weekly Notes of Cases 527; see also as sustaining this proposition, Koelges v. The Guardian

ton v. American Mutual, 25 Conn. 542; Ryan v. The World Mutual, 41 Conn. 168; Catoir v. American Life, 33 N. J. L. 487; Wall v. Home Ins. Co., 8 Bosw. 597; Franklin Life v. Sefton, 53 Ind. 380; Wells v. Society, 17 Ontario 317; State v. Society, 42 Mo. App. 485; Brown v. N.W. Legion, 81 Iowa 400; Harvey v. Grand Lodge, 50 Mo. App. 472.

did not recollect having paid any attention to the statement in the application that she was the niece of the member.¹

When a certificate has become void through non-payment of an assessment, and it provides that agents may not make, alter or discharge contracts or waive forfeitures, or receive assessments in arrears, except upon a written application in prescribed form for a revival, which must be acted on by the society itself, and when there is no evidence that the agent actually possessed, or ever before attempted to exercise the power to waive a forfeiture or revive a lapsed certificate, it is error for the court to refuse to charge the jury that a collecting agent had no power to waive the forfeiture or to bind the society by receipt of the assessments in arrear, without any application for revival, and for the court to charge that payment by the member, and receipt by the agent of the assessments in arrear for the purpose of revival, would warrant a recovery on the lapsed certificate.²

Where there is a schism in a mutual benefit society and a division takes place, some of the members remaining in the original society, and others forming another, it is competent, unless the law of either society forbids it, for a person to belong to both organizations. If, after a person has been admitted to membership in both societies, one of them passes a resolution making it a forfeiture of membership for any of its members to continue in fellowship with the other, it must be shown that this resolution was known to the person against whom a forfeiture on that ground is claimed, and if the officers of this society after the passage of the resolution have received dues and assessments from him with notice that he had not severed his connection with the other, it is estopped from insisting on his failure to do so as a ground of forfeiture.³

Where a contract provides that if assessments are not paid

¹Supreme Council v. Green, 71 Md. 263; 17 Atl. Rep. 1048. to local, but not to general agents. The latter are presumed to possess

²Metropolitan Ins. Co. v. McGrath, 52 N. J. L. 358; 19 Atl. Rep. 386; authority to transact the general business of the company. Hartford Catoir v. Trust Co., 33 N. J. L. 487; Life v. Hayden, 90 Ky. 39; 13 S. W. Rep. 585; Carrigan v. Ins. Co., 53 Vt. 418; Ins. Co. v. Booker, 9 Heisk. 606; Marcus v. Ins. Co., 68 N. Y. 625; see § 277.

³Warnebold v. Grand Lodge, 83 Iowa 23; 48 N. W. Rep. 1069; dis-

when due, and within the lifetime of the member, and that the acceptance of any assessment after maturity shall not be a waiver of prompt payment of future assessments, the acceptance of three previous assessments after maturity, and the promise after the maturity of another assessment to accept it if paid before a certain date constitute no waiver of the forfeiture incurred by the failure to pay at maturity. Where the member died without having paid the last mentioned assessment, the contract was held to be void.¹ A by-law providing that if a member is in arrears when taken sick he shall not be entitled, by paying such arrearages, to benefits during such sickness, is not waived by the acceptance of arrearages from a member after he has taken sick.² If the society, without any inquiry as to the health of the member, accepted past due assessments from him while he was suffering from a fatal illness, it can not avoid liability on the contract of insurance on the ground of fraudulent concealment in the failure of the member to voluntarily disclose his condition.³ Where a society receives from a member payment of an assessment while a subsequent assessment is past due, it waives the right to claim a forfeiture on the ground that such subsequent assessment was not paid within the time stipulated in the contract.⁴

§ 302. **Waiver of forfeiture—Assessments retained by the society.**—A society may not retain the assessment paid before the death of a member, and refuse to pay the insurance to the beneficiary of the certificate, on the ground that it was not paid within the time stipulated in the contract.⁵ Where, in an action on a contract of insurance, it is shown that the society knew for eighteen months after proof of death that the deceased member had misrepresented his age in his application for membership, but had never at any time offered to rescind or cancel the contract sued on, or to refund

tinguishing *Bock v. A. O. U. W.*, 75 Iowa, 462; 39 N. W. Rep. 709.

¹ *Lantz v. Ins. Co.*, 139 Pa. St. 546; 21 Atl. Rep. 80; *Want v. Blunt*, 12 East. 183; *Harvey v. Grand Lodge*, 50 Mo. App. 472.

² *Nagel v. Glasburger*, 10 N. Y. Supp. 503.

³ *Spitz v. Association*, 25 N. Y. Supp. 469; 5 Misc. Rep. 245.

⁴ *De Frece v. Ins. Co.*, 19 N. Y. Supp. 8; see *Menard v. Society*, 63 Conn. 172; 27 Atl. Rep. 1115.

⁵ *Underwood v. Iowa Legion of Honor*, 66 Iowa 134; *Shea v. Association*, 160 Mass. 289; 35 N. East. Rep. 855; *Spitz v. Association*, 25 N. Y. Supp. 469.

the money it had received, it will be held to have ratified and confirmed the contract, and is estopped from asserting the misrepresentation as a defense to the action.¹ Where a member of a mutual benefit society fails to pay his assessments during a certain year, and the society, not discovering such failure, demands and receives subsequent assessments, and retains them until after the death of the member, it will be held to have waived the forfeiture for non-payment, and is liable for the amount due on the certificate.² Assessments may be retained by the society in such a manner, and under such circumstances, as to constitute an act of affirmance of the contract of insurance after, as well as before, the death of the member whose life was insured.³ A society after demanding, receiving and retaining until after the death of a member the amount of an assessment due from him, can not claim that the money was demanded and received by mistake, and that the certificate is forfeited.⁴ The right to a certain benefit fund was forfeited, in case the assured at his death had not paid all assessments against him, but after his death all assessments against him were paid for him in pursuance of authority granted and a request made during his lifetime, and were by his local lodge, which was defendant's agent in the collection of assessments, received and forwarded to defendant, and by it accepted and retained until after commencement of a suit for the benefit fund. These assessments were accepted and retained with knowledge, on the part of both the local lodge and the defendant corporation, of the death of the assured, and the court held that the forfeiture for non-payment in the lifetime of the assured had been waived, and that the defendant corporation was liable.⁵ In *Joliffe v. Madison Mut. Ins. Co.*,⁶ it was held that an acceptance by the insurer of part

¹ *Gray v. National Ben. Ass'n*, 111 Ind. 531; 11 N. E. Rep. 477.

² *Tobin v. Society*, 72 Iowa 261; 33 N. W. Rep. 663; *Roswell v. Aid Union*, 13 Fed. Rep. 840.

³ *Masonic Mutual v. Beck*, 77 Ind. 203; *Joliffe v. Madison Mutual*, 39 Wis. 111; *Grand Lodge v. Cohn*, 20 Ill. App. 335; *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376; *Cotten v. Ins. Co.*, 41 Fed. Rep. 506.

⁴ *Bailey v. Association*, 71 Iowa 689; 27 N. W. Rep. 770; *Millard v. Supreme Council*, 81 Cal. 340; 22 Pac. Rep. 864; *Menard v. Society*, 6 Conn. 172; 27 Atl. Rep. 1115.

⁵ *Erdmann v. Mut. Ins. Co. of Order of Herman's Sons*, 44 Wis. 376.

⁶ 39 Wis. 111.

of the premium on a fire insurance policy, with knowledge that the property had been destroyed, was a waiver. In the opinion, the court alludes to the peculiar terms of the contract; but the waiver is put distinctly and clearly on the ground that, as the company had accepted the cash premium after the default and notice of loss, this operated as a waiver of the suspension clause in the policy. In another case of mutual fire insurance, it was held that where a society imposes a forfeiture of the contract, in case of loss while its assessment is unpaid, but its local agent receives the past due assessment with knowledge of a loss, and forwards it to the society without notifying its officers of the facts, and the officers receive the assessment, and two or three weeks afterward order the loss to be paid when adjusted, they can not afterward refuse payment on the ground of the delay in paying the assessment, since they have waived that by receiving it when overdue and by ordering payment.¹

Whether assessments have been retained an unreasonable length of time, and under such circumstances as to waive a forfeiture, is a question for the jury to determine. In the absence of evidence showing that an administrator of a deceased member had been appointed and qualified to receive payment of assessments paid by the deceased, and that the society retained such assessments for an unreasonable time after such appointment of an administrator, and after learning the facts on which it claims the policy to be void, the forfeiture is not waived.² The forfeiture of a contract for non-payment of an assessment may be waived by the subsequent acceptance of it; but where the society within a reasonable time refuses to accept and retain the amount of a delinquent assessment, and returns it to the member or his representative, no forfeiture is waived. A certificate of membership in a mutual benefit society was subject to a by-law providing that, if any assessment was not paid within thirty days after notice, it should be forfeited. Several assessments were permitted to remain unpaid long after the thirty days, and on the day of the member's death, the person to whom the notices of assessments had been sent called on the local agent of the society, and offered to pay

¹ Farmers' Mutual v. Bowen, 40 Mich. 147.

² Matt v. Society, 70 Iowa 455; 30 N. W. Rep. 799.

the amount of such assessments. The agent, who had no authority to make arrangements in regard to the standing of members agreed to accept the money and forward it to the society, whose office was twenty-eight miles distant, subject to its action in the matter. In his report he said: "If money is not received, must be refunded." About ten days afterward, the society gave notice through the agent that the payment would not be accepted, and offered to return the money. It was held that the court did not err in leaving it to the jury to say whether the delay in refusing the money amounted to a waiver of the forfeiture.¹ Where a member failed to meet the assessments made upon him, but subsequently transmitted to the secretary an amount of money in payment of all dues which had been demanded of him, which sum the society retained for four months and until after his death, without notifying him whether the payment was satisfactory or not, such retention of the amount by the society was a waiver of the default, and restored him to membership.² The grand lodge of a mutual benefit association, by accepting and retaining the dues of an applicant for a beneficiary certificate, with knowledge of the facts, waives all irregularities in the organization of the subordinate lodge and in the admission of the applicant to its membership.³

§ 303. **Waiver of forfeiture—Conditional acceptance of past-due assessments.**—When a contract of insurance has been forfeited for non-payment of an assessment, it is at an end, and unless its provisions confer upon the member some right to revive it, it can only be revived by some act of the society. The society may be willing to revive it only on certain conditions, and since such conditions are the terms of a new contract, they may be accepted or refused by the member. If they are accepted by him, he is, of course, bound by them. The receipt of a past-due assessment on the written condition that the member is of temperate habits, and in as good health as when the certificate was issued, otherwise the payment, receipt, and certificate to be void, is of no effect against the

¹ *United Brethren v. Schwartz*, 120 Pa. St. (not reported); 13 Atl. Rep. 769; 12 Cent. Rep. 728.

² *Perine v. Grand Lodge*, 48 Minn. 82; 50 N. W. Rep. 1022; S. C., 53 N. W. Rep. 367.

³ *Georgia Masonic Mutual v. Gibson*, 52 Ga. 640.

society, if he is not of temperate habits and is not in such a state of health.¹ A receipt given for the payment of an assessment which is past due will naturally express the terms of the waiver, or the conditions of reinstatement, or whatever else is essential to give renewed life to the old, or to create a new contract, and a delinquent, whose past-due assessment is accepted as a matter of favor, is bound by the terms of such a receipt, whether he reads it or not.² A member of a society forfeited his certificate by failing to pay an assessment due December 7, 1882, when the secretary of the society wrote him, in substance, that if he would send in the assessment immediately, he would send a receipt without default. The assessment was not then paid, but on the 25th of that month the member was taken sick, and on the 31st of the month he died. On the 30th, however, at his request, his wife, who was the beneficiary of his certificate, remitted the money, and it was received, at the office of the society, January 1st. A receipt for the assessment was returned in printed form, containing the provision that it should be valid only on condition that the assured should be alive and in good health, on the day of its date; but there was written, in the handwriting of the secretary, on the margin of the receipt the words "no default." After the society was informed of the death of the assured, it returned the money to the widow. It was held, upon these facts, that because the remittance was not made immediately upon receipt of the letter of December 7th, the offer therein contained to waive the default, was at an end; that, since the assured was not alive at the date of the receipt, it was invalid by its own terms. The written words "no default," not being repugnant to the printed conditions of the receipt, must be construed in connection with such conditions; and the true meaning is that there should be no default provided the assured was alive and in good health at the time of its date.³ It has been held that the provision that the insured is in good health does not apply to his actual state, but to his supposed condition. Where an insured had sustained an injury just before the society received a payment

¹ Ronald v. Association, 132 N. Y. 378; 30 N. East. Rep. 739; affirming 7 N. Y. Supp. 152 and 10 N. Y. Supp. 632. ² Ronald v. Association, *supra*.
³ Servoss v. Society, 67 Iowa, 86; Unsell v. Ins. Co., 32 Fed. Rep. 443.

on condition that he was in good health, but no danger was anticipated by him, his medical attendant or the agent of the society, the subsequent fatal termination of the injury did not avoid the payment.¹ But in another case it was held that where a certificate, conditioned to be void on non-payment of dues, provides that the assured may be reinstated on payment of delinquent dues and "satisfactory evidence of good health," the taking of delinquent dues by the insurer from an agent of the assured, on the day before the assured's death of fatty degeneration of the heart, and the giving of a receipt, providing that the payment and receipt shall be void unless the assured is in as good health as when originally received as a member, do not constitute a waiver of the breach of the contract, since no "satisfactory evidence of good health" could, under the circumstances, be furnished.² The receipt of dues from a member of a mutual benefit association after the expiration of the time limited for their payment, and the sending of a letter to him informing him that the association has reinstated him provided he was in usual good health when the dues were paid, do not amount to a waiver of a forfeiture of the policy, where the insured was in fact fatally ill at the time of payment.³

The reinstatement of a delinquent member by the receipt of his back dues on condition that he "is now and has been during the past twelve months in continuous good health, and free from all disease, infirmity, or weakness" is not vitiated and void by reason of the fact that he had had during the preceding twelve months, a slight illness of a temporary nature which did not indicate a vice in his constitution, and from which he had fully recovered at the time of the receipt of his dues. In order to make such a conditional reinstatement ineffectual, the illness must have been such that he would not have been received if he had been an original applicant for insurance.⁴ After a member of a mutual benefit association had forfeited her membership by failure to pay an assessment within the time required by the certificate, the assess-

¹ *Campbell v. Ins. Co.*, 24 Up. Can. C. P. 133.

⁴ *French v. Association*, 111 N. C. 391; 16 S. E. Rep. 427; *MacRae, J.*, dissenting.

² *Ronald v. Association*, *supra*.

³ *Garbutt v. Association*, 84 Iowa 293; 51 N. W. Rep. 148.

ment was paid, and a receipt given therefor, which recited that the payment was made and received and the receipt given by the association, and received by the member, on condition that such member "is now in good health, and free from all diseases, infirmities, or weaknesses." It appeared that the member's health had begun to be affected about a year before the forfeiture by the natural decline of age, which resulted in her death soon after the receipt was given, but that she was subject to no disease, and that her only infirmities were those natural to old age. It was held that the evidence failed to show that the condition of the receipt was not fulfilled.¹

§ 304. The assured sent a draft for the amount of the premium after it was due. The company collected the draft, and wrote to the assured: "As this is past due, it will accord with our rules for you to send us a certificate of good health, and in your case we will be satisfied with your own. You did not write me where to send the renewal receipt, and so I have not inclosed it." It was held that it was not clear that the assured did understand or could have understood that his money was received only on condition of his furnishing the certificate; that it was error to non-suit the plaintiff, and that the facts should have been submitted to a jury, so that they might determine whether there had been a waiver of the forfeiture.² A society may by its subsequent acts waive the conditions upon which it received a past due assessment. When a society may declare the contract forfeited for non-payment of an assessment, but, instead of taking this course, accepts payment of it on condition that the member is in good health, it may not retain the money, levy other and subsequent assessments and still insist upon the forfeiture, unless fraud was practiced by the member in concealing the state of his health at the time of making the payment.³

Where payment of an assessment was accepted by the

¹ *Griesa v. Association*, 133 N. Y. 619; 30 N. East. Rep. 1146; affirming 15 N. Y. Supp. 71; see *Lindsey v. Society*, 84 Iowa 734.

² *Rockwell v. Ins. Co.*, 20 Wis. 335; S. C., 21 Wis. 548; S. C., 27 Wis. 372.

³ *Stylov v. Odd Fellows' Mutual*, 69 Wis. 224; 34 N. W. Rep. 151; *Erdmann v. Ins. Co.*, 44 Wis. 376; *Kenyon v. Knights Templar*, 122 N. Y. 247; 25 N. East. Rep. 299; *Buckle v. Ins. Co.*, 18 Barb. (N. Y.) 541; *Mutual Benefit v. Coats*, 48 Ill. App. 185.

society after the time for making such payment had expired, and a receipt was given therefor, stamped across its face with the words "Received on condition that member is in good health," but nothing was said by the member as to his health after he had received the receipt, and no inquiries relative to the condition of his health were made then or subsequently by the society, the subsequent levy and unconditional acceptance by the society of assessments on the member operated as a waiver of the forfeiture, although the member was, at the time of the conditional acceptance, in ill health. In deciding this question, the court said: "Without expressing any opinion as to the effect of the retention of that money (the assessment which was paid after it was due), we think the levy of the subsequent assessments, and the acceptance of the money paid upon them, amounted to such a waiver. When the time came for the levy of a new assessment, if Mr. Rice's policy was to be treated as still in force, he would properly be included in the assessment; otherwise not. Under this state of things, six other assessments upon him were made by the company; all of which were seasonably paid. There was no determination by the directors of the company that, for the time being, Mr. Rice's policy should be treated as not in force or suspended, but in making new assessments, so far as appears, no pains were taken, and no intention was formed, to exclude him. No condition was in express terms annexed to the levy of these new assessments, or to the acceptance of the payments of the assured upon them. The company, however, contends that the condition of the former acceptance reaches forward, and applies also to the later payments; and that it is not bound by later assessments which it made and later payments which it received in ignorance that the assured was in ill health at the time of the former payment. But it can not be allowed in this way to imply a condition in favor of a forfeiture. It had knowledge that on the former occasion the payment had been made too late, and that the money had been accepted with a condition annexed. If, before levying a new assessment, the company wished to know the particulars as to Mr. Rice's health, and thus to determine whether that payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so; instead of notifying him that it wished for some

positive evidence or statement upon the subject; instead of imposing a further condition, relating back to the time of the former payment, the company made an unconditional call upon him for the payment of the new assessment. It acted under no deception or misrepresentation, but with all the information which it cared to take the pains to acquire. We are unable to see how it can properly be held that the former conditional acceptance cuts down the effect of the later unconditional acceptance. The condition related to the former payment alone. Suppose the payment of the former assessment had never been made at all; and the company, without insisting upon the non-payment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition; could it be contended that there was no waiver? An unconditional acceptance of an assessment waives all the former known grounds of forfeiture; and this effect is not varied or limited because an acceptance of a former assessment had been on condition, and had not amounted to such a waiver.”¹

A member failed to pay an assessment within the time required by her certificate, and by its terms it became void. It provided, however, that she might be reinstated by the officers of the society for reasons satisfactory to them and on such conditions as they might impose. A few days after the expiration of the time limited the member paid the assessment and received a receipt which declared that the payment was received on condition that she was at the time “in good health and free from all diseases, infirmities and weaknesses,” and stipulated that no subsequent payment to the society of assessments on the certificate should “impair, waive, alter or change any of the conditions of this receipt or of said certificate.” Notices of subsequent assessments were given, which stipulated that no condition on which any previous payment had been

¹ Rice v. Society, 146 Mass. 248; 15 well v. Ins. Co., 27 Wis. 372; see Lyon N. East. Rep. 624; 5 N. Eng. Rep. 813; v. Supreme Assembly, 153 Mass. 83, citing upon the last proposition, 26 N. East. Rep. 236, which is distinguished from the Rice case; see Hodgdon v. Ins. Co., 97 Mass. 144; Bouton v. Ins. Co., 25 Conn. 542; Ins. Conway v. Ins. Co., 140 N. Y. 79; 35 Co. v. Raddin, 120 U. S. 183; see N. East. Rep. 420; Mutual Benefit v. also Stylow v. Odd Fellows, etc., 69 Coats, 48 Ill. App. 185. Wis. 224; 34 N. W. Rep. 151; Rock-

received should be waived by accepting payment of these assessments. They were paid from time to time, and afterward a notice of an annual assessment for expenses was sent to her, which provided that "the sending of this notice shall not be held to waive any forfeiture or lapse of membership, if previous assessments remain unpaid." It was held that even if the condition of the first receipt was not fulfilled, the subsequent dealings between the parties showed a waiver of the forfeiture for non-payment of the assessment within the required time. It appeared in this case that about a year before the forfeiture the member's health began to be affected by the infirmities of old age, that she died from such infirmities, and was subject to no disease. The court held that the evidence failed to show that she was not "in good health and free from all diseases, infirmities or weaknesses."¹ Where money for payment of an assessment is retained by the society, and a receipt therefor is mailed, stating a condition on which it is accepted, the society must, in the absence of any stipulation for such communication through the mail, show that it was received by the member; otherwise the fact that the money was received after the time fixed for payment will be held to have been waived.²

Where the defense in an action on a contract of insurance is that it had lapsed for non-payment of an assessment, and that the member had procured it to be reinstated by representations as to his health, which were not guaranteed to be true, but which he knew at the time to be false, defendant must prove that the member knew them to be false.³ A suspended member paid his delinquent assessments; and in his application for reinstatement stated that he was then in good health and that "if this statement be found to be in any respect untrue, the policy shall be treated in the same manner as if the assessment had not been accepted." It was held that this condition was unqualified, and that the beneficiary could not recover if the statement was untrue in fact, even though honestly made.⁴ After a member had made default in the

¹ *Griesa v. Association*, 15 N. Y. Supp. 71; affirmed, 133 N. Y. 619; 30 N. Y. Supp. 269.

² *N. East. Rep.* 1146.

³ *Patten v. Association*, 70 Hun

⁴ *Richards v. Association*, 85 Me.

⁵ *Shea v. Association*, 160 Mass. 289; 99; 26 Atl. Rep. 1050.

35 N. East. Rep. 855.

payment of an assessment, the amount thereof was handed to the treasurer of the society. He gave no receipt, but said he would take the money to the next meeting and ask to have the member reinstated, and that he would mail a receipt on his reinstatement. The member died before the next meeting, and the money was returned. It was held that there was no waiver of the forfeiture for non-payment.¹

§ 305. **Waiver of forfeiture**—**The levy of an assessment on a delinquent member.**—While it is proper for a society to provide in its contract that a failure to pay an assessment within a given time after notice shall work a forfeiture of all claims against it under that contract, yet a forfeiture of this character is a matter of strict legal right. It may be waived, and, if waived, can not again be asserted. In fact, in order to assert it, the society must abide inflexibly by the terms of its contract.² It follows that conduct on the part of the society inconsistent with an intention to abide by the strict terms of the contract and to insist upon a forfeiture, if not amounting to, is at least evidence of a waiver of the forfeiture. The levy of an assessment, notifying the delinquent member to pay it within a certain time, receiving payment of it from him, and retaining the money paid are all acts inconsistent with an intention to stand by the terms of the contract and assert the forfeiture, and end to show a waiver.³ It may be laid down as the general rule that every time a society levies an assessment on a member who has failed to pay a previous assessment within the time prescribed by its laws, it waives the forfeiture of the contract for such failure to pay, and acknowledges that, notwithstanding the non-payment, he is one of its members.⁴ The

¹ McGowan v. Supreme Council, 28 Knights Templar, 122 N. Y. 247; 25 N. Y. Supp. 177.

² Metropolitan Ass'n v. Windover, 137 Ill. 417; 27 N. East. Rep. 538; Johnson v. Ins. Co., 79 Ky. 403; Murray v. Association, 90 Cal. 402.

³ Metropolitan Ass'n v. Windover, 48 Kans. 718; S. C., 49 Kans. 677; 30 *supra*; Tobin v. Society, 72 Iowa 261; 33 N. W. Rep. 663; Roswell v. Aid Union, 13 Fed. Rep. 840; Rice v. Society, 146 Mass. 248; 15 N. East. Rep. 624; 5 New Eng. Rep. 813; Erdmann v. Ins. Co., 44 Wis. 376; Kenyon v.

Knights Templar, 122 N. Y. 247; 25 N. East. Rep. 299; Stylow v. Ins. Co., 69 Wis. 224; 34 N. W. Rep. 151; Elmer v. Association, 19 N. Y. Supp. 289.

⁴ Modern Woodmen v. Jameson, 48 Kans. 718; S. C., 49 Kans. 677; 30 Pac. Rep. 460; 31 Pac. Rep. 733; Stylow v. Ins. Co., *supra*; Jackson v. Association, 78 Wis. 463; 47 N. W. Rep. 733; National Mutual v. Jones, 84 Ky. 110; Farmers' Union v. Wilder, 35 Neb. 572; Shay v. Society, 7

society has a right to declare the contract forfeited if the assessment is not paid within the stipulated time, but this forfeiture is for the benefit of the association, and the levy of an assessment upon a delinquent member is a clear recognition of the validity of the contract, and an acknowledgment of his rights as a member.

Where a contract provides that a failure to pay an assessment shall cause it to lapse, and that the society reserves the right to cancel the contract, a default in payment will be waived, where the society does not declare a forfeiture, but continues to levy assessments.¹ A member of a society paid several assessments about a month after they were due, and paid the last assessment about two months after it was due. This last payment was made at its home office, when he was informed by the general manager that he was delinquent in another assessment, and that still another assessment would fall due on the following day. No forfeiture of his rights was suggested. It appeared that the notices of assessment stated that agents were not authorized to extend the time of payment of assessments, and that any delay beyond the stipulated time would be at the risk of the member. The member died about twenty days after his last payment, leaving two assessments unpaid, and the certificate remained uncanceled. Under these circumstances it was for the jury to say whether there had not been a waiver of the forfeiture.² On the trial of the case just cited the society offered to prove by its secretary and principal manager that he told the member on one occasion that some of his assessments were overdue, that he thereby lost his right to his certificate, and that he was delaying payment at his own risk and peril. This testimony was excluded, and, in reviewing this action of the court below the supreme court said: "We are unable to perceive the materiality of this evidence. The court admitted in evidence no-

N. Y. Supp. 287; *Wright v. Supreme Commandery*, 87 Ga. 426; 13 S. E. 145.

Rep. 564; *Sweetser v. Association*, ¹ *Farmers' Union v. Wilder*, 35 117 Ind. 97; 19 N. East. Rep. 722; Neb. 572; 53 N. W. Rep. 587.

Bankers' Association v. Stapp, 77 ² *Sweetser v. Association*, 117 Ind. Texas 517; 14 S. W. Rep. 168; *Millard* 97; 19 N. East. Rep. 722; see *Bankers' v. Supreme Council*, 81 Cal. 340; 22 Ass'n v. Stapp, 77 Texas, 517; 14 S. Pac. Rep. 864; *Farmers' Mutual v. W. Rep.* 168.

tices of assessments received by the insured, upon every one of which was printed substantially the same information, only in more emphatic terms. Insurance companies can not, however, either by printed notices or by verbal communications, continue their right to insist upon forfeiting a contract for non-payment of assessments, and at the same time habitually accept overdue assessments whenever tendered. After a forfeiture has occurred, a new assessment against the member, and an acceptance of the overdue assessment, inevitably waives the previous forfeiture, notwithstanding the notice that non-payment will be at the risk of the member. It was therefore wholly immaterial what the secretary may have told the insured concerning his delinquency and its effect upon his certificate, provided the course of dealings of the association, and the acts and declarations of its agents, were such as to induce him to believe that the time for payment would be extended as theretofore.”¹

§ 306. But the levy of an assessment on a delinquent member may be made under such circumstances as to rebut the inference that by such levy it acknowledges him to be an existing member. A waiver of a right presupposes a knowledge of the right waived, and is not to be inferred from a merely negligent act, or from one done under a misapprehension of the real condition of the rights of the parties at the time.² A waiver never takes place unless it is intended or unless the act relied on ought in equity to estop the party from denying that he intended it to be a waiver of the condition precedent. After a society had declared a contract forfeited for a violation of its by-laws, and after it had notified the member of this fact, it passed a resolution directing that an assessment be levied on all contracts “in force at this date,” and the treasurer assessed the forfeited contract by mistake. The member paid the assessment and claimed a waiver of the forfeiture, but the court held that there had been no waiver.³ A certificate provided that a failure to pay an assessment within forty days after notice of the death of a member, should work a forfeit-

¹ See *Painter v. Association*, 131 Ind. 102; *Robertson v. Metropolitan Ins. Co.*, 88 N. Y. 54.

lard v. Supreme Council, 81 Cal. 340; ³ *Diehl v. Mutual Ins. Co.*, 58 Pa. 22 Pac. Rep. 864. St. 443; see *Leonard v. Lebanon Mu-*

² *Miller v. Union Central*, 110 Ill. 527.

ure, and a rule of the society provided that a member whose policy had lapsed might be reinstated upon presenting a certificate of good health and paying all unpaid assessments. Notices of the death of four members and the consequent assessments were sent at intervals to the member, but he paid nothing upon them. Afterward, when on his death-bed, a fifth notice of assessment was sent to him, and his brother-in-law, not knowing that the other assessments were unpaid, sent the money to pay this one. The secretary held the money, and wrote inquiring about the unpaid assessments. When this letter was written the member was dead, and when the society learned of his death it tendered the money to his personal representative. In deciding that there had been no waiver of the forfeiture the court said: "Were the assessment notices in themselves sufficient evidence of a waiver? In considering this question regard must be had to the resolution of the company passed in 1872 providing that 'the secretary notify all those whose policies have lapsed from non-payment of assessments or dues, that they may be reinstated in the company by producing to the company a certificate of good health from any regularly graduated physician, obtained at their own expense, and the payment of all dues and assessments.' It appears by the testimony that the company acted under this resolution. The secretary says: 'I sent the notices to members that they might be reminded of their previous membership and might reinstate themselves, if possible.' This evidence was uncontradicted. This company appears, as its name implies, to have been organized upon the principle of mutual protection. A large amount of indulgence seems to have been extended to the members, and a liberal provision made by which defaulting members might be reinstated. It would be unjust to the company if this liberality should be turned against itself, and assessment notices which were intended for a different purpose should be held to be a waiver of a forfeiture in favor of a policy holder who never paid nor offered to pay his dues. We fail to see sufficient evidence of a waiver to justify the submission of that question to the jury."¹

Where a member is in default for non-payment of an assess-

¹ *Mutual Protection v. Laury*, 84 Pa. St. 43; *Crawford County Mutual v. Cochran*, 88 Pa. St. 235.

ment, which, by the rules of the society, forfeits his right to benefits, but does not terminate his fraternal membership or his right to reinstatement on conditions to the benefit class, the forfeiture is not waived by the society sending a notice of the next assessment, calling attention to the fact that the prior assessment remained unpaid.¹

The relations of the society and the delinquent member may be such under the terms of the contract that the levy of an assessment on him will not be construed as a recognition of full rights of membership in him. Where the contractual relation between the society and the member is not wholly dissolved by the non-payment within a certain time of the assessment called for, but the liability of the society on the contract of insurance is merely suspended by such non-payment during the time the assessment remains unpaid, the society does not, by the levy of a second or subsequent assessment during the period of default in the payment of a prior assessment and during the period of consequent suspension of liability, remove the disabling consequences resulting to a member and his beneficiary from his neglect to pay his assessment.² The sending of notices of assessment after default, in such a case, will not be construed into an acknowledgment of liability upon the contract and a waiver of the suspension, but will be held to be reminders to the member that he may, under the contract, revive his certificate.

A member of a mutual fire insurance company insured her property, and the policy contained a condition that, if such assessments as were laid by the company should not be paid within thirty days after notice thereof, the policy should be invalid so long as the assessment remained unpaid. In June, 1872, an assessment was made, and notice was given to the member, but she neglected to pay it. In May, 1873, another assessment was laid on policies in force on January 1, 1873, and an agent of the company sent a notice of both assessments to the member. The property was destroyed by fire, and the member tendered payment of the two assessments within

¹ Schmidt v. Modern Woodmen, 84 St. 230; Lantz v. Ins. Co., 139 Pa. Wis. 101; 54 N. W. Rep. 264. St. 546; 21 Atl. Rep. 80; Lyon v.

² Leonard v. Lebanon Co. Mutual, Supreme Assembly, 153 Mass. 83; 26 3 Weekly Notes of Cases 52; Crawford N. East. Rep. 236.
ford Co. Mutual v. Cochran, 88 Pa.

thirty days after receipt of her second notice. The tender was refused, and suit was brought by the member. It was held by the supreme court of Pennsylvania, that the act of the agent in sending the second notice of assessment was not in itself a waiver of the suspension of the policy, which had been worked by the non-payment of the assessment, and which was under the contract to continue until the assessment should be paid. And the court also held that, in order to recover, it was necessary for the member to further show that the company had laid the second assessment on this policy, thereby recognizing it as in force on January 1, 1873, and authorizing the sending of the notice.¹ Where the failure to pay an assessment does not absolutely avoid the contract of insurance, but the member is entitled to reinstatement to benefits under it within a certain time, the levy of an assessment on him within that time is not sufficient evidence of a waiver of forfeiture.

When a delinquent member has a right to reinstatement to benefits under his contract of insurance, either with or without conditions, the making of subsequent assessments which he is required to pay before he can be reinstated, and the giving him of notice thereof, do not in any manner waive his first default, but are entirely consistent with the duty of the society toward him until he has been in arrears for the time stipulated, within which he may be reinstated.²

§ 307. **Waiver of forfeiture—Attempt to collect assessments.**—As has been said, the society must inflexibly abide by the terms of the contract in order to insist upon a forfeiture of it. Any act inconsistent with an intention to stand by its terms is evidence of a waiver of the forfeiture. A notice that an assessment has not been paid, suggesting that it should be paid at once, is evidence of such a waiver. An assured died on June 29, without having paid a premium which was payable June 28, on penalty of forfeiture of rights under the contract. After the premium was due, to wit, on July 2, the company addressed a letter to the assured, which con-

¹ Leonard v. The Lebanon Mutual v. Modern Woodmen, 84 Wis. 101; Ins. Co., 3 Weekly Notes of Cases 527. 54 N. W. Rep. 264; Stiepel v. Asso-

² Leffingwell v. Grand Lodge, 86 ciation, 55 Mo. App. 224. Iowa 279; 53 N.W.Rep. 243; Schmidt

tained the following: "The premium on your policy fell due June 28. If you wish to continue this policy in force, you will please remit above amount to this office by return mail and oblige." The court held, in an action on the policy, that this letter clearly showed that the company had not elected to forfeit the policy for the failure to pay the premium when due, but that the right of forfeiture reserved in the policy had been waived.¹ A mutual benefit society is estopped from claiming that a certificate of membership has been forfeited, where it recognizes its continued existence by notifying him that "it is now liable to immediate suspension, unless prompt attention be given to this notice."² In an action on a certificate of membership, it was shown that notices of assessment and dues of date of January 1, of dues of March 1, and of May 1, were given to the deceased member, and default made in payment. It was claimed that by the default the deceased member, under the terms of the contract, forfeited his rights of membership. It was conceded that, by the terms of the contract, the society might have treated him as having forfeited all his rights, but it was shown that a like notice of dues and assessment came from the office of the society addressed to the member of the date of July 1, following, and was taken from the postoffice at his place of residence July 8, the day before he died. This notice required him to pay \$2.10 within thirty-five days and contained the statement that "having no deaths, we omitted our usual assessments for March and May; this includes deaths reported to date." And it was further shown that, by letter dated May 20, of the same year, the secretary advised the member that his assessment of January had not been paid, and added: "You make a great mistake in not keeping up the insurance. * * Let me hear from you by enclosed postal if you want to drop out." After the death of the member, and before the expiration of thirty-five days after the receipt of the notice of July 1, the plaintiff as beneficiary tendered payment of all unpaid dues and assessments, and the society refused to accept them. It was held that there was sufficient evidence to permit the jury to con-

¹Chicago Life v. Warner, 80 Ill. 411; True v. Association, 78 Wis. 287; 47 N. W. Rep. 520. ²Olmstead v. Farmers' Mutual, 50 Mich. 200.

clude that the society had continued the membership of the deceased and effectually waived his failure to make prompt payments.¹

A certificate provided for six assessments per annum, and that no claim should be made under it if payment was not made within thirty days from the date of notice that an assessment was due. The assessments of June 1 and August 1 were unpaid on September 1, and the society wrote the assured: "According to the conditions of your certificate of membership, an assessment amounting to \$29.40 will be due and payable at this office on the 1st of October, 1886." The assured died September 30, and it was held that the letter showed a waiver of the right to declare the contract forfeited for non-payment of the assessments of June and August.² A certificate provided that a failure to pay an assessment within thirty days after the mailing of the notice should terminate the contract and forfeit the rights of membership, but that for any valid reason the member might be reinstated and the contract renewed, by the payment of all assessments in arrears. A notice was sent to the member on June 1, and the assessment not having been paid within thirty days, a second notice was sent on July 5. The assessment was paid on July 21, after the death of the member, and the officers of the society, knowing of his death, gave a receipt in the ordinary form. It was held that the sending of the second notice was a waiver of the forfeiture for non-payment within the required time after the first notice, and, having received such payment unquestioned, the society could not repudiate its liability on the certificate.³ The unauthorized acts of the ministerial officers of a subordinate lodge can not operate to dispense with a member's duty to comply with the laws of the supreme lodge in regard to the prompt payment of assessments. A benefit society is not estopped from enforcing a forfeiture of a policy

¹ *Baker v. N. Y. State Mutual* *Ins. Co. v. U. S. Association*, 51 Ill. App. Benefit Ass'n, 27 N. Y. Weekly Dig. 40.

91; see *Worden v. Guardian Mutual Life Ins. Co.*, 39 N. Y. Superior Ct. 317; *Penn Mutual v. Keach*, 134 Ill. 583; 26 N. East. Rep. 106; *Muel-*

² *Murray v. Association*, 90 Cal. 402; 27 Pac. Rep. 309; see § 283.
³ *Shay v. Benefit Society*, 7 N. Y. Supp. 287.

for non-payment of an assessment by the fact that one of its sub-agents attempted, without special authority for the act, to collect a past due assessment.¹

¹ Illinois Masons' Ben. Soc. v. Bald- Lansing, 480; Bouton v. American win, 86 Ill. 479; Borgraefe v. Supreme Mutual, 25 Conn. 542; Ryan v. The Lodge, K. of H., 22 Mo. App. 127; World Mutual, 41 Conn. 168; Catoir Leonard v. The Lebanon Mutual, 3 v. American Life, 33 N. J. L. 487; Weekly Notes of Cases, 527; see also, Wall v. Home Ins. Co., 8 Bosw. 597; as sustaining this proposition, Koel- Franklin Life v. Sefton, 53 Ind. 380. ges v. The Guardian Life Ins. Co., 2

CHAPTER XXII.

ASSESSMENTS.

§ 308. Property of society in assessments levied, or to be levied. Are unpaid assessments assets of the society? Can payment of them be enforced?

309. Interest of the society in the fund collected by assessments.

§ 308. **Property of society in assessments levied, or to be levied—Are unpaid assessments assets of the society? Can payment of them be enforced?**—It may be stated as a general rule that an assessment under a certificate of membership in the nature of a policy of insurance in a mutual benefit society does not make the member holding the certificate a debtor to the society, so as to authorize it, or its receiver, or assignee in bankruptcy, to bring suit, in case of neglect or refusal of the member to pay such assessment.¹ The measure of the member's liability is, of course, to be found in the contract of insurance. The principle upon which this contract is based in mutual benefit insurance is that the members of the society shall be at liberty to pay assessments, or not, as they shall elect; that membership in the society and contribution for death losses shall be merely voluntary; and that a member may at any time sever his connection with the society, and leave it without any claim upon him, and leave him without any claim upon it. Under such contracts, neither the death losses in the society nor the assessments to pay them create any liability upon the member to pay. When such a society has been placed in the hands of a receiver or assignee, the fact that death losses had accrued against the society for which assessments should have been made, but which the society neglected to make, prior to the institution of proceedings for appointment of a receiver, or prior to the assignment, does not authorize the court to exercise the functions of the society

¹ §§ 248, 249.

by making these assessments. The amount to be assessed to pay death losses is not an asset of the society.¹

The contract of insurance may modify this plan, and provide that the member shall be liable for all death losses and assessments made during the time he is a member of the society and entitled to the benefits secured by such membership. In such case, so long as he is a member he is liable for death losses and assessments, and, on his refusal to pay, an action may be maintained therefor. The by-laws of a society provided that "upon the death of any member of the association, it shall be the duty of the secretary to notify the members of the same, and thereupon each member shall within thirty days after such notification pay to the secretary the amount required by the rules of the association," and that if any member should neglect to pay any assessment required by the by-laws, "then, and in such case, such membership shall cease and determine at once without notice, and all claims be forfeited to the association." The court held that the neglect to pay an assessment for thirty days after notice thereof *ipso facto* determined the membership of the delinquent; that he was liable for the amount of all assessments previously made, and also for all losses happening prior to the time when he ceased to be a member, though no assessment therefor had been made; that a receiver of the society, appointed in an action brought by the state to procure its dissolution, might assess the members for unassessed losses, and bring separate actions against each member to recover the assessments so made against him; and that it was the duty of the receiver to distribute the amounts so received equitably among the several creditors of the company.² An application for insurance in a mutual benefit society contained a provision that the contract should become null and void on default of payment of an assessment. It also contained an agreement to pay all dues and assessments until the member should give notice of withdrawal, and made reference to the by-laws of the society. These by-laws required compliance with the stipula-

¹ *In re Protection Life Ins. Co.*, 9 Bissell 188; see *Burdon v. Association*, 87; see *Hyatt v. Wait*, 37 Barb. (N. 147 Mass. 360; 17 N. East. Rep. 874; Y.) 29.

² 6 N. Eng. Rep. 840.

tions of the application, and provided that the "member shall be held liable to the association for all dues and assessments until he shall have given notice of his desire to withdraw," and that, "in case of default," such membership shall cease and determine at once without notice, and all claim shall be forfeited to the association. In construing these provisions of the application and by-laws, the supreme court of New York held that it was left optional with the society to terminate, or treat as terminated, the membership of one who is in default of payment of dues and assessments, or to continue his membership, and charge him with liability to pay dues and assessments until he gives notice of his withdrawal.¹ Where a member is liable for death losses and assessments made while he was a member of the society, such liability is an asset in the hands of a receiver of the society.²

§ 309. **Interest of the society in the fund collected by assessments.**—It has frequently been urged by counsel in the adjudicated cases that a mutual benefit society is an agent—a mere machine for the collection of assessments, that such societies have no interest in the fund collected by them on assessments for death losses, that the fund is the property of the beneficiary for whose benefit it was collected, and may not, for any reason, or upon any pretext, be withheld from such beneficiary. But courts have uniformly held, when they have passed upon the question, that such a doctrine is untenable. When assessments have been paid into the treasury of a mutual benefit society, they become, in a certain sense, the property of the society. They are not assets of the society to the extent that they are subject to its general debts, but

¹ *Baker v. N. Y. State Mutual Benefit Association*, 27 N. Y. Weekly Dig. 91.

² *Vanatta v. Ins. Co.*, 31 N. J. Eq. 15; *Com. v. Ins. Co.*, 112 Mass. 116; *Ins. Co. v. Rand*, 24 N. H. 428; *Sterling v. Ins. Co.*, 32 Pa. St. 75; *In re Equitable Reserve Ass'n*, 16 N. Y. Supp. 80. For necessary averments in a complaint or declaration by a receiver against a member for unpaid assessment, see *Downs v. Hammond*, 47 Ind. 131; *Embree, Receiver, v.*

Schideler, 36 Ind. 423. The contract is to pay upon the happening of certain contingencies—death of member, and order of assessment. In such cases, the statute of limitations does not begin to run until the date of the assessment. *Smith v. Ball, Receiver*, 107 Pa. St. 352; *In re Ins. Co.* 10 R. I. 42; *Bigelow v. Libby*, 117 Mass. 359; *Hope Mutual v. Weed*, 28 Conn. 51; *Howland, Receiver, v. Cuykendall*, 40 Barb. 320.

the amount collected on an assessment belongs to the society for the benefit of a special class of debtors—the beneficiaries—and is subject to the proper disposal of its officers.¹ It is the right and duty of the society to protect from all invalid claims its members and the funds in its hands, for whatever purpose and however such funds may have been raised. Even where the society acquires a benefit fund by virtue of an assessment levied upon and paid by its members for the purpose of paying a certain specified death loss, the society has such a property in, or relation to the benefit fund that it may refuse to pay that claim, and resist its payment on the ground of its invalidity. The society is, in a certain sense, the agent of its members, but it is an agent with special and defined powers and limitations, and the true and obvious construction of these powers and limitations forbids the payment of a claim which, for any reason, is invalid. The fact that it has realized the money by assessment for the purpose of paying such a claim, under the impression that it was, or might prove to be, a valid claim, is no waiver of its duty to see to it that no payment shall be made, in case the claim is, in fact, illegal. The duty of protecting such fund it still owes to its members who have paid their assessments and formed the fund, trusting to the fidelity of the society to protect them and it from invalid claims.² Where members have paid to the society an assessment for a death loss, and the officers of the society have decided not to pay the claim, an assignment to the beneficiary, by the members, of the assessments so paid by them to the society, will not entitle the beneficiary to any part of the fund. After payment of assessments into the treasury of the society, the members can neither assign the fund, nor maintain an action to recover the assessments. The society controls the disposition of such a fund.³ The funds of a society derived from assessments upon members to pay losses are, in their nature, trust funds to be applied to the payment of such losses. The application of such funds to the purchase of the assets of an-

¹ *In re* Protection Life Ins. Co., 9 Equitable Reserve, 16 N. Y. Supp. Bissell 188; *Fisher v. Andrews*, 37 80.

Hun (N. Y.) 176; *Wilber v. Torger-* ² *Mayer v. Equitable Life Association*, 42 Hun (N. Y.) 237; see § 338.

son, 24 Ill. App. 119; *Burdon v. Association*, 147 Mass. 360; 17 N. East. ³ *Swett v. Citizens' Mutual*, 78 Me. Rep. 876; 6 N. Eng. Rep. 840; *In re* 541; 7 Atl. Rep. 394.

other like society, or to the payment of losses upon contracts of insurance of such other society, the risks of which it has assumed, is a misapplication of them.¹ A death claim had accrued, an assessment was levied and collected, and payment to the beneficiary was delayed without substantial grounds, until after the society passed into the hands of a receiver, and it was held that this fund was impressed with a trust in the receiver's hands and could only be applied to the payment of the claim for which it was levied.²

¹ State *ex rel.* v. Monitor Ass'n, 42 Ohio St. 555; Stamm v. Association, Supp. 80; see § 121 *et seq.*
² *In re Equitable Reserve*, 16 N. Y. 65 Mich. 317; 32 N. W. Rep. 710.

CHAPTER XXIII.

ACTION ON THE CONTRACT OF THE SOCIETY.

- § 310. An action may be maintained on the contract of a society to pay benefits.
- 311, 312. The right of a society to provide methods for the settlement of claims against it.
- 313, 314. When the courts of a society must be resorted to.
315. A strict construction must be given to provisions abridging a common right.
316. Authorities holding that the society may make the decision of its tribunal final.
317. Authorities holding that a society may not make the decision of its tribunal final.
- 317a. Arbitration clauses.
318. Actions on by-laws for benefits.
319. Effect of expulsion on the claim of the expelled member for benefits.

§ 310. **An action may be maintained on the contract of a society to pay benefits.**—Where a society provides in its contract for the payment of sick benefits or accident indemnity to its members, an action at law may be maintained against it, on its refusal to fulfill its part of the contract.¹ There is a suggestion in some of the opinions in the books that no such action may be maintained, and a case decided many years ago is always cited as sustaining that doctrine.² In the opinion in that case it is said: “Even were there not a sentence in the way, payment of his stipendiary allowance could not be enforced by action. The society never consented to expose itself to the costs and vexation of an action for every weekly pittance that might be in arrears. * * The remedy by action is therefore misconceived.” The sentence which stood in the way of a

¹ Dolan v. Court Good Samaritan, 20; Kentucky Lodge v. White, 5 Ky. 128 Mass. 437; Smith v. Society, 12 Law. Rep. 418.

Philadelphia 380; Magee, Adm'r, v. ² The Black and White Smiths' So- Clayton Lodge, 5 Del. 453; Cartan v. ciety v. Vandyke, 2 Wharton (Pa.) Father Mathew Society, 3 Daly (N.Y.) 313.

recovery in that case was the judgment of the society, expelling the claimant, and the question for decision was, whether an expelled member could collaterally attack the rightfulness of his expulsion in a suit for benefits alleged to have accrued after his expulsion. The court was, without doubt, right in its conclusion that such a collateral attack might not be made.¹ But the question of the form of action, or the right of a member of a mutual benefit society to sue for benefits arising out of its contract was not before the court in that case. The opinion therein expressed is not based upon reasoning; it is a mere assertion. Nevertheless, afterward in another case,² where a member of a society brought an action to "recover the amount of six weeks' benefits as a sick member," and where the plea was "*non assumpsit*," it was held in the court below that the Vandyke case was conclusive that such an action would not lie, and a verdict was directed for the defendant. The case was taken to the supreme court of Pennsylvania, and was there decided upon another point. The ruling of the court below was not considered in the decision, although it was the only question discussed by counsel. In a later case³ it was held that these cases were not binding upon the subordinate courts of the state, as authorities upon the proposition that an action for benefits may not be maintained by a member against the society, and judgment was rendered against the society on such a claim. It may confidently be asserted that societies which agree to pay certain sums of money on certain conditions are amenable to the law, and that in the absence of provisions to the contrary in the contract, the member, or the beneficiary of a deceased member may resort to the courts in the first instance to enforce his claim against the society.

§ 311. **The right of a society to provide methods for the settlement of claims against it.**—In some of the preceding chapters the rule has been discussed concerning the right of a society to provide within itself methods for redressing grievances in all matters of discipline, and for deciding controversies in relation to its property, its doctrine and its policy.⁴ There is a conflict of opinion as to the extent to which a mutual benefit society may go in restricting actions for bene-

¹ §§ 52, 53, 319.

³ *Smith v. Society*, 12 Philadelphia

² *Toram v. Association*, 4 Barr (Pa.) 380.

519.

⁴ §§ 47 to 50, 111.

fits promised to members or their beneficiaries in consideration of the payment of dues and assessments. Some authorities are to the effect that such a society may provide in its contract of membership for a tribunal for the trial of any claim against it, arising from its agreement to pay benefits, may compel the claimant to submit his claim to the jurisdiction of such tribunal, and may make its powers plenary, and its action final. But the better rule seems to be that while a society which issues certificates of insurance agreeing to pay a certain sum of money as a benefit during a member's illness, or upon his death, in consideration of his payment of dues or assessments, may not, by provisions of its charter, by-laws, or certificates of membership, create in advance a judicial tribunal for the final and conclusive settlement of controversies which may arise under its agreement to pay benefits or death losses, yet it may by such provisions or stipulations create a tribunal within the society for the trial of such claims, and may compel a member or beneficiary to submit his claim to such tribunal, in accordance with such provisions, before resorting to the courts of the land. It is just and reasonable for men voluntarily associating themselves for a worthy object to require of each other, in advance, an agreement that the business affairs of the society shall be brought for discussion and settlement in its tribunals, before they shall be made the subject of litigation in the public courts, and there is nothing in such an agreement in conflict with a member's right, under the constitutions and laws of the land, to appeal to the courts in matters pertaining to his property, and nothing which seeks to take away the jurisdiction of such courts. There is manifestly a broad distinction between an agreement to do certain things before bringing an action, on the one hand, and an agreement to refer to arbitration, or to submit to and abide by the decision of the courts of a society, on the other hand. An agreement which merely requires certain acts to be done or omitted before bringing an action, not only does not attempt to oust courts of jurisdiction, but contemplates an appeal to the courts after certain preparation. An agreement to abide by the decision of the courts of a society is equivalent to an agreement that no action shall be brought in the courts of the state. While specific performance of an agreement to do or

omit certain acts before bringing suit can not be enforced, courts of law or equity will refuse to take cognizance of a claimant's demand until he has exhausted those remedies in the tribunals of the society which the contract stipulates that he must pursue.

To hold that such societies can establish judicial tribunals and confer upon them power to decide finally and conclusively upon property rights, even of its own members, is to recognize in them the attributes of sovereignty; and to take away entirely the power to abridge the right to resort to the public courts, would greatly impair their strength and usefulness. The rule as stated is liberal and is strictly in harmony with the principles of the law.

§ 312. It will be observed that the controverted question is as to the legality of such provisions of the contract as seek to give to the tribunals of the society the exclusive jurisdiction of claims arising from its contracts. The decision of the question, therefore, affects all societies alike, whether they be incorporated or unincorporated. It must be remembered that the by-laws of a society incorporated under the laws of the land must be reasonable and necessary for its government, and where a by-law of such a society provides that all claims against it, growing out of its contracts with its members, must be submitted to its own tribunals for settlement, and that the decision of such tribunals shall be final, the further question arises, whether such a by-law is necessary for its good government, and whether it is reasonable that the society shall constitute itself the judge of its liability, and of the amount which it ought to pay to the claimant.

Where the stipulation is contained in the certificate, and not in the by-laws, it is in the nature of a special agreement and is not open to the objection that it is not reasonable and necessary.¹

§ 313. **When the courts of a society must be resorted to.**—When the contract requires a member or his beneficiary to submit his claim to a tribunal of the society, and in case of an adverse decision on it, to appeal to certain appellate tribunals, he has no right to bring an action on the claim in the courts of the land, until he has exhausted his remedies in the

¹ § 23.

courts of the society.¹ Where the by-laws provide that the decision of a subordinate tribunal shall be final, unless reversed on appeal by the supreme council, a member who is dissatisfied with the decision of the lower tribunal must, before resorting to the courts of the land, appeal to the supreme council of the society.² Where the by-laws of a society provide that the board of trustees shall examine all claims of members for sick benefits, and, if found correct, shall order the same to be paid, a member may not resort to a suit at law for such benefits, without giving the board an opportunity to examine his claim.³ It has been held that, where a member makes a claim against a society for money due upon its contract, and claims to stand in the relation of a creditor of the society, or where the beneficiary of a deceased member makes a claim against the society for money due upon its contract of insurance, a mere right to submit the claim to a tribunal of the society, and to appeal from its decision to a higher tribunal in the society, without a stipulation that the claimant *must* resort to the prescribed methods of procedure, does not abridge the right of the claimant to appeal, in the first instance, to the courts to coerce payment, when payment is withheld. The corporate rights of a member of an incorporated mutual benefit society are subject to the control of the corporation, and the rights of a member of an unincorporated society are subject to the will of the majority, under the contract of membership. It is only proper and just, therefore, to hold that, when the society has legislated upon a matter concerning the contract of membership and the rights which may arise thereunder, its provisions must be followed

¹ *Poultney v. Bachman*, 31 Hun 14 N. Y. Supp. 361; *Supreme Sitting* (N. Y.) 49; *Lafond v. Deems*, 81 N. Y. 508; *White v. Brownell*, 2 Daly Rep. 136; *Supreme Council v. Forsinger*, 125 Ind. 52; 25 N. East. Rep. 129; *Schryver v. Columbia Lodge*, 3 Oh. Cir. Ct. 422; *Anderson v. Supreme Council*, 135 N. Y. 107; 31 N. East. Rep. 1092; see §§ 47, 111.

² *Supreme Council v. Forsinger*, *supra*.

³ *Robinson v. Society*, 67 Cal. 135; *Association*, 3 W. & S. (Pa.) 218; 7 Pac. Rep. 435.

Burns v. Union, 10 N. Y. Supp. 916;

by one who claims relief under the contract of membership. Controversies concerning the discipline, property, government, dissolution, etc., of the society arise directly from the contract of membership, and, where a mode of deciding controversies and settling disputes in such matters is provided for within the society, the prescribed mode must be pursued whether the language used in prescribing it be permissive or mandatory. But the right of a member to sick benefits, or accident indemnity, and the rights of a beneficiary in the benefit fund rest upon the contract entered into by and between the society and the member. The contract of the society to pay benefits or indemnity is a different contract from that of membership, although both contracts are often embodied in one.¹

By the contract of membership the member becomes a part of the society, and all his rights, as a member, are to be viewed from his relation to, and interest in the society. But in promising to pay benefits and indemnity to the member or a benefit fund to his beneficiary, the society contracts with him as with a stranger, or, at least it contracts with him in his capacity as an individual, not as a member, and their relations are to some extent antagonistic, and may become entirely so. The contract between the society and the insured is to be construed most strongly against the society and in favor of the insured and his beneficiary, and where the contract merely gives to the insured a right to submit his claim to a tribunal of the society for adjudication, it will not be so construed as to compel him to submit it. And then again, courts of justice are freely open to those who seek money due them upon a contract, and the party who asserts that the right to invoke the aid of the court has been curtailed, must show a clear agreement abridging the right. If a man has a legal right, and the society to which he belongs adds others, that of submitting his claim to the society for adjustment, and that of appeal to its superior governing bodies, the added rights are merely cumulative; they are not exclusive. Positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right; in order to destroy such a right, proper limiting words

¹ See § 6.

must be employed.¹ It must be admitted that this principle has not been kept in view in the reported cases, but this distinction is certainly sustained by sound reasoning. It is analogous to the well-established general rule that where two courts, organized under the laws of the same state, have concurrent jurisdiction of the subject-matter of an action, the suitor may choose the one to which he will submit the adjudication of his rights.

§ 314. Any unjust procedure or unreasonable delay on the part of the tribunal of the society in investigating and passing upon a claim presented to it, which clearly shows that it is acting in bad faith and in practical disregard of the claimant's rights, will excuse him from exhausting his remedies in the society, and give him the right to proceed at once in the public courts.² Where a member is prevented from exhausting the remedies provided by the society for the recovery of claims against it, by the willful refusal of the proper officer to certify to his sickness, from which refusal no appeal is provided for by its laws, he is entitled in the first instance to institute a suit and recover judgment in a court of law upon a valid claim for sick benefits.³

Where, after a claim has been rejected by the proper tribunal of a subordinate lodge, the supreme tribunal on motion of one of its members reviews the ruling of the subordinate tribunal and affirms its rejection of the claim, the member need not formally prosecute an appeal, but may at once resort to the courts of the land.⁴

§ 315. **A strict construction must be given to provisions abridging a common right.**—It is easy for a society to make such provisions in its contract as it may deem desirable and necessary, and there is no reason why such provisions should be extended by construction. When rules and articles of association are resorted to against common right, courts lean to a strict construction.⁵ A by-law of a society, which provides

¹ *Bauer v. Samson Lodge*, 102 Ind. 262; 1 N. East. Rep. 571; *Supreme Mo. App.* 468.

Council v. Garrigus, 104 Ind. 133; 3 N. East. Rep. 818.

² *Carlen v. Drury*, 1 Ves. & Beames 154; *White v. Brownell*, 2 Daly 329.

³ *Supreme Sitting v. Stein*, 120 Ind. 270; 22 N. East. Rep. 136.

⁴ *McMahon v. Supreme Council*, 54

Wallace v. Ins. Co., 41 Fed. Rep. 742; *Strasser v. Staats*, 13 N. Y.

Supp. 167.

for a right of appeal from the proceedings of a lodge "in all matters of form required by the constitution and laws of the order," does not apply to a resolution directing that sick benefits be, or be not paid, but only has reference to those observances for breach of which there may be trial and punishment.¹ One of the by-laws of a society provided that "every matter in dispute between this institution, or any person acting under or on behalf of this institution, and any member thereof or person claiming on account of any such member, shall be referred, to, and decided by arbitrators appointed," etc. In construing this rule, it was held that it did not apply to the case of a claim by the administrator of a member for the amount of a certificate of insurance on the life of such member, and consequently, that those provisions were no answer to an action by an administrator on the certificate. The court said: "The case of an executor does not fall within this language, for he does not claim on account of the member, but on his own account."² The fact that the laws of a society provide that any sick brother shall report to the chief officer of the society, whose duty it shall be to draw on the treasurer for the sum allowed by law, if he is satisfied that the brother is entitled to sick benefits, does not make his decision final. In such case the officer acts merely as an agent of the lodge, and possesses no judicial authority.³ The laws of a mutual benefit society provide that, on notice of the disability of a member, a board of physicians shall examine him, and report to the supreme council; that all proofs for death or disability benefits shall be approved by the subordinate council; and that, upon approval of satisfactory proofs of a member's disability, he shall be entitled to a benefit. These provisions do not give the subordinate council the right to reject a claim for either a death or disability benefit. Such a right will never be presumed, but must be given in the clearest and most explicit terms.⁴ A provision that in cases of dispute "the members shall exhaust their remedy in the order, before

¹ *Mattoon v. Wentworth*, 4 Cin. Law Bull. 513.

³ *Kentucky Lodge v. White*, 5 Ky. Law Rep. 418.

² *Kelsall v. Tyler*, 34 Eng. L. & Eq. 588. The decision in this case is placed mainly on another ground.

⁴ *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721; *Grand Central Lodge v. Grogan*, 44 Ill. App. 111.

resorting to a court of law" relates not to controversies with the order itself, but to controversies of members within the order.¹

A by-law provided: "Claims against the association shall be referred to the board of directors, and upon the approval of a majority of said board, with that of the president, the same shall be paid by the secretary and treasurer. It shall also be the duty of the board to examine all books, papers and accounts of the association, and know that the business is honestly and properly conducted. They shall decide all points of dispute and questions of doubt that may arise, and their decision shall be final." The court held that the questions on which the decision of the board was to be final were those which might arise from the examination of its accounts, the management of its business and the conduct of its internal affairs, but that the right was not conferred upon the board to decide finally on claims against the association for mortuary benefits under its contracts of insurance.²

§ 316. **Authorities holding that the society may make the decision of its tribunal final.**—In one case, in determining whether the court would inquire into the suspension by the society of the payment of weekly benefits to a member, it was said: "Can the right to recover them be passed upon here? Those were payable in case of sickness or inability to work. The association, by its rules, provided a means of ascertaining the circumstances under which, or by reason of which, the party should be entitled. The degree of sickness or inability was, in the very nature of the case, an open and indefinite matter. How much departure from the standard of full health would be necessary, or what the standard should be, or what would constitute inability to labor, would, in many cases, be very difficult to determine by any legal rules. The propriety, therefore, if not necessity, of leaving this matter to be determined by the society or its committee, according to its own rules, assented to by all its members is, to my mind, very apparent. And as long as the society and its com-

¹ Buckofzer v. Grand Lodge, 15 N. 35 N. East. Rep. 168; Railway Association v. Loomis, 43 Ill. 599; Daniher

² Railway P. and F. C. Mut. Aid and v. Grand Lodge (Utah), 37 Pac. Rep. Ben. Ass'n v. Robinson, 147 Ill. 138; 245.

mittee acted in good faith, without fraud, their determination should be deemed conclusive."¹

The charter of a society provided that, under certain circumstances, in case of sickness, a member was to be allowed a certain sum per week. "This allowance is to be made from the time of his application in writing to the president, whilst so much remains in the funds." In an action for benefits under the charter, plaintiff introduced the charter, proved membership, sickness and application to the president. The record does not state whether there had been any decision on the application by the president, or the society. The supreme court of Pennsylvania, in deciding this case, said: "The corporation is bound by the fundamental articles to pay only when it is in funds, and it has determined that it is not. As the plaintiff in becoming a corporator assented to its acts prospectively to be done, according to the charter of its constitution, he is concluded by the decision of his own forum. We are to believe that the proper authorities passed judicially on his claim, and we are not to re-judge their judgment."² In one case it was held that a by-law of a mutual benefit society, which invests a committee with authority to determine whether a member claiming to be sick is entitled to the benefit provided for in the by-law, is valid and reasonable, and where a member applies to the society for aid, the decision of the committee is final.³

A by-law of a society read as follows: "The executive committee shall have power to pass on all death claims, and if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased members thereof, and give them or their attorneys an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness or validity of such claim, and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding upon such claimant, unless an appeal is taken to the great camp. The notice of the appeal from the decision of the said com-

¹ Fritz v. Muck, 62 How. Pr. 70. 378; 29 N. W. Rep. 863; 6 Western

² Toram v. Association, 4 Pa. St. Rep. 132; see Robinson v. Templar 519. Lodge, 97 Cal. 62; 31 Pac. Rep. 609;

³ Van Poucke v. Society, 63 Mich. see § 49.

mittee must be filed with the great record keeper within sixty days thereafter. The decision of the great camp, in all such cases, shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary." A member holding a certificate for \$1,000 died, and his wife as beneficiary presented her claim to the committee, which decided against it on the ground that at the time of his death he was not a member in good standing, but had been duly and regularly suspended therefrom, in accordance with the rules and regulations. She then appealed to the grand camp, which also disallowed the claim, after a full examination and hearing. She then brought suit, and judgment was rendered against her. The supreme court of Michigan said :¹ "It is claimed on behalf of plaintiff that the provision above quoted, which makes the decision of the great camp final, is contrary to public policy, and void, in that it ousts the court of jurisdiction. No charge is made that either the committee or the grand camp acted fraudulently, or in any manner contrary to the rules and regulations of the order. I am unable to see any difference between the present case and that of *Van Poucke v. Society*.² These organizations are purely voluntary, and it may well be considered by their members important that claims of this character should be determined by methods more inexpensive than resorts to the courts. This reason is well expressed by my Brother Champlin in the case above cited. Plaintiff seeks to maintain a distinction between that case and the present one, in that the plaintiff was himself a member claiming for "sick benefits," while the plaintiff here is not a member, and had no voice in the selection of members of the tribunal. Her right depends solely upon the voluntary act of her husband in becoming a member. Her right to receive the benefit depended upon his complying with the constitution and rules to which he assented, and which became a part of his contract. I can see no reason why a different rule should apply to plaintiff than to a member making a claim for benefits. Similar provisions have been sustained by the courts."³

¹ *Canfield v. Great Camp*, 87 Mich. 626; 49 N. W. Rep. 875; see *Hembeau v. Great Camp* (Mich.), 59 N. W. Rep. 417.

² *Supra*.

³ Citing *Anaconda Red Men v. Murbach*, 13 Md. 91; *Toram v. Association*, 4 Pa. St. 519; *Society v. Van-*

It was held that the decision as to the right to benefits under the by-laws of a mutual benefit society, made by the officer or body which the constitution required should decide it, was conclusive, and could not be reviewed by the courts.¹ Where a member of an incorporated mutual benefit society has a claim against the society for benefits under its by-laws, which has been disputed, and decided against him by the decision of the proper tribunal acting under the general laws and by-laws of the order, "whose decision," it is provided, "shall be final," a court of law has no jurisdiction over an action to recover such benefits.² The laws of a mutual benefit society provided that where a member had a cause of complaint against the society for benefits, he should appeal to the different courts of the order naming them, and should he neglect to pursue this course, and bring a suit in court, he should be expelled from the society. A member presented a claim against the society to the proper tribunal of the order, appealed to each of the courts as provided in the laws, and in each of these courts his claim was denied. He then brought suit in the courts of the state of Maryland, but it was held, following *Anacosta Tribe v. Murbach*, *supra*, that the courts of that state had no jurisdiction of the claim.³ A corporation was organized under the laws of Illinois for the purpose of providing for its members in case of permanent disability, and for their dependents in case of death, by assessments to be levied on surviving members. Its constitution provided: "All claims against the association shall be referred to the board of directors, whose decision shall be final," and "assessments shall not be made, except on its authority." A claim against the corporation for \$2,500, on a contract of insurance issued by it upon the life of a deceased member, was made before the board of directors. The board of directors, at a regular meeting, after an investigation of the facts in regard to the claim, by a unanimous vote, refused to allow the claim and order an assessment for its payment, assigning as a reason that the deceased was at

dyke, 2 Whart. 309; *Woolsey v. In-hawk Lodge v. Wentworth*, 4 Cin. dependent Order of Odd Fellows, 61 Law Bull. 513.

Iowa, 492; 16 N. W. Rep. 576; *Rood* ² *Anacosta Tribe v. Murbach*, 13 v. Association, 31 Fed. Rep. 62. Md. 91.

¹ *Cincinnati Lodge v. Littlebury*, ³ *Osceola Tribe v. Schmidt*, Adm'r, 6 Cin. Law Bull. 237; see also *Mo-* 57 Md. 98.

least sixty days delinquent in the payment of his assessments at the time of his death. It was held that the power of these directors, in regard to the allowance of this claim, and the ordering of an assessment to pay it, was plenary and final, and that after the decision of the board, refusing payment of the claim, no suit could be maintained upon it. In his opinion the learned judge cites no authorities, but reasons as follows: "It was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the society should be final, and there can be no doubt, from the language of the clause of the constitution just quoted, that they have so agreed. The duty of the board of directors is two-fold; first, to approve the claim, and, second, to order an assessment to pay it, and no member is under any obligations, expressed or implied, to pay an assessment for the liquidation of a claim against the association unless the claim has been approved by the board of directors, and the assessment ordered by the board. Waiving, therefore, all questions as to whether the board of directors would be under any more obligations to approve this claim after a judgment had been rendered in favor of this plaintiff than before, it is sufficient to say that it seems clear to me that the sole power of determining whether the association should or should not pay a claim, and an assessment be ordered to pay it, is vested in this board of directors, and no court can review or re-examine their decision in that regard. The constitution says the action of the board shall be final, and the courts must so treat it."¹

§ 317. **Authorities holding that a society may not make the decision of its tribunal final.**—There are two cases² which are sometimes cited as sustaining the broad proposition that a society which issues contracts of insurance, or agrees

¹ Rood v. Railway Association, 31 Fed. Rep. 62. In Railway Association v. Robinson, 147 Ill. 138, 35 N. East. Rep. 168, this case was criticised, and the court said: "The case of Rood against this same association reported in 31 Fed. Rep. 62 is in point, and in that case a different result was reached. While we have the highest respect for the distinguished judge who rendered that decision, we are unable to yield our assent to its conclusions." See Railway Association v. Loomis, 43 Ill. App. 599.

² Bauer v. Samson Lodge, 102 Ind. 262; Supreme Council v. Garrigus, 104 Ind. 133.

to pay benefits, can not by provisions in such contracts and agreements compel a member or beneficiary to resort to the courts of the society and exhaust his remedies therein, before bringing an action in the public courts on such contract. While the discussion and argument of the questions involved took a wide range in these cases, the points decided by the court by no means sustain such a proposition. They hold that it is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies.¹ A society can not by provisions of its contract confer upon its own tribunals the exclusive power to pass upon the validity of claims against it, and thus deprive the courts of jurisdiction to entertain actions against it.² In treating of the power of individuals or societies to create judicial tribunals, the court of appeals of New York said:³ "The effect of some of these provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection or control of the parties upon whose rights they sit in judgment. To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunals for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit, confers no power upon the arbitrator, and even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen. It would hardly accord with his scrupulous care to secure fairness, in such cases, that parties should be legally bound by the sort of engagement that

¹ *Elkhart Mutual v. Houghton*, 98 Ind. 149; *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Supreme Council v. For-singer*, 125 Ind. 52; 25 N. East. Rep. 129; see § 112; see § 49.

² *Poultney v. Bachman*, 10 Abb. N. Cas. 252; *Daniher v. Grand Lodge (Utah)* 37 Pac. Rep. 245.

³ *Austin v. Searing*, 16 N. Y. 112, 123; see *Strasser v. Staats*, 13 N. Y. Supp. 167; *Railway Association v. Robinson*, 147 Ill. 138; 35 N. East. Rep. 168; S. C., 38 Ill. App. 111.

exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation." In *Scott v. Avery*,¹ the Lord Chancellor said: "There is no doubt of the general principle that parties can not by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases."

The articles of association of a society contained the following clause: "The directors shall have full power * * to adjust, settle and decide all claims and demands upon the society by the members thereof; or to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurances or claims upon, or liabilities by or to the society, and concerning the laws, rules, regulations and by-laws of the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof; and no member of the society shall be allowed to bring or have any action, suit or proceeding, or other remedy against the society or the members thereof, for any claims or demands upon or in respect of the society or the members thereof." On the authority of *Scott v. Avery*, *supra*, it was held that an action at law might be maintained against the society on a contract of insurance.² In another case it was said:³ "While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they can not entirely close the access to the courts of law. The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void." The opinion of the supreme court of the

¹ 5 House of Lords Cas. 811.

38; *Noyes v. Marsh*, 123 Mass. 286;

² *Edwards v. Ins. Soc.*, L. R., 1 Q. B. Div. 563, 592, 598; see *Hill v. McGunn v. Hamlin*, 29 Mich. 476, 481; *Contee v. Dawson*, 2 Bland Ch. More, 40 Me. 515; *March v. Railroad*, (Md.) 264, 276; *Cooke v. Cooke*, L. 40 N. H. 548; *Smith v. Railroad*, 36 R., 4 Eq. Cas. 77. N. H. 458, 487; *Pearl v. Harris*, 121 ³ *Stephenson v. Ins. Co.*, 54 Me. 70. Mass. 390; *Vass v. Wales*, 129 Mass.

United States upon this question is shown by the following language:¹ "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his freedom, or his substantial rights. In a criminal case he can not be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may, no doubt, waive the rights to which he may be entitled. He can not, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."²

§ 317a. **Arbitration clauses.**—Clauses requiring that all differences or matters of dispute arising under contracts of life and accident insurance shall be submitted to arbitration are sometimes, though not often, contained in such contracts. There are many decisions on the construction and effect to be given to the exact language in which such provisions have been framed. An agreement that any matter of dispute between the society and a claimant for benefits under the contract shall be submitted to arbitrators is void, and will not prevent the claimant from maintaining a suit at law or in equity, in the first instance, to enforce his rights under it.³

¹ Home Ins. Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Laws, 31; Street v. Rigby, 6 Ves. 818; Gourlay v. Somerset, 19 Ves. 431; Nichols v. Chalie, 14 Ves. 271; 2 Pars.

² See Nute v. Hamilton Mutual, 6 Gray (Mass.) 174; Hall v. People's Mutual, 6 Gray 185; Boynton v. Ins. Co., 4 Met. 212; Reichard v. Ins. Co., 31 Mo. 518; Cont. 707; Reed v. Ins. Co., 138 Mass. 575; 1 Story Eq. Jur. § 670; Gere v. Ins. Co., 67 Iowa, 272; German Ins. Co. v. Steiger, 109 Ill. 254; Nurney v. Ins. Co., 63 Mich. 633; 30 N. W.

³ Insurance Co. v. Morse, 20 Wall. 445; Kinney v. Association, 35 W. Va. 385; 14 S. East. Rep. 8; Stephenson v. Ins. Co., 54 Me. 70; Cobb v. Ins. Co., 6 Gray 192; Smith v. Association, 51 Fed. Rep. 520; 2 Tuck. Com. Rep. 350; Liverpool v. Creighton, 51 Ga. 95; Phoenix v. Badger, 53 Wis. 283; Williams v. Ins. Co., 54 Cal. 442; Whitney v. Association, 52 Minn. 378; 54 N. W. Rep. 184.

Courts of general jurisdiction have by the law of the land a right to take cognizance of such controversies, and parties may not by contract oust them of such jurisdiction. But parties may by contract make the decision of arbitrators, or of any third person, a condition to a right of action, for such a contract contemplates a submission to court of the controversy, and merely makes the decision of the arbitrators, or third person, a condition precedent to the right to sue.¹ Unless, however, the stipulation is definite and explicit that no action shall be brought until an arbitration is made, courts will not hold it to be a condition precedent to a right of action.² The decisions of the courts on arbitration clauses are conflicting, and those of the state in which the controversy is pending must be examined in order to determine the rule which will be there enforced. The decided weight of authority is to the effect that though the question of the liability of the society on the contract is not a proper one to require parties to submit to arbitration under the terms of such a contract, yet the agreement to submit collateral, incidental and special facts for the decision of arbitrators will be upheld.

§ 318. **Actions on by-laws for benefits.**—In an action against a mutual benefit society for the recovery of sick benefits, the burden of proof is on the plaintiff to establish a by-law, rule or custom rendering the society liable for such sick benefits.³ An action may be maintained by a member of a mutual benefit society upon a by-law of the society agreeing to pay benefits to members in case of sickness. In such an action the by-law is the basis and foundation of the suit, and it is not a sufficient averment that "it is a rule of the association that every member in good standing when sick shall be entitled to sick benefits." A mere rule is a thing which can be abrogated at the pleasure of the association, and has not the binding force

¹ Condon v. Company, 14 Grat. (Va.) v. Association, 154 Mass. 77; 27 N. 314; Scott v. Avery, 36 Eng. Law and East. Rep. 769; Morley v. Ins. Co., 85 Eq. 1; Mentz v. Ins. Co., 79 Pa. St. Mich. 210; 48 N. W. Rep. 502; Campbell v. Ins. Co., 136 U. S. 242; 10 Sup. Ct. Rep. 945; Wood v. Humphrey, 114 Mass. 185; Carroll v. Ins. Co., 72 Cal. 297; 13 Pac. Rep. 863.

² Smith v. Association, *supra*; Kinney v. Association, *supra*; Crossley v. Ins. Co., 27 Fed. Rep. 30; Badenfeld ³ Mullally v. Irish Am. Ben. Soc., 6 Pac. Rep. 78, decided by Supreme Court of California, but not reported in California Reports.

of a contract between the corporation and its members.¹ Where it is provided in the by-laws, as a prerequisite to recovery of benefits, that the member applying shall furnish a physician's certificate to the "sick committee," it must be furnished before an action will lie to recover such benefits. The mere exhibition of such certificate to a member of such a committee is not sufficient.² If an incorporated benevolent society, the by-laws of which provide for the payment of a weekly allowance to a sick member upon the performance of a certain condition by him, refuses to fulfill its contract, the member injured thereby may at once maintain an action at law against it, where the by-laws of the society make no provision for a tribunal to decide questions arising between the society and its members. The by-laws of a society provide that a sick member on sending to the society "every week during his sickness" a certificate signed by a qualified surgeon, stating his illness, "shall be entitled to a weekly allowance of five dollars." A member of the society was taken ill in another state, and sent to the society a certificate stating his illness, signed by a person who was in fact a surgeon in attendance upon him, but who did not describe himself in the certificate as such. Accompanying the certificate was a letter from the member in which he spoke of it as the doctor's certificate. No other certificate was furnished until after his return to Massachusetts about three months later, when he furnished a certificate that he had been ill since the date named in his first certificate. In a suit upon the by-law providing for sick benefits, it was held that the first certificate was a substantial compliance with the by-laws, and entitled the member to receive an allowance for one week, and that he was not entitled to any further allowance.³ The by-laws of an incorporated mutual benefit society provided that a member who became incapable of working in consequence of sickness or accident, should receive from the society a certain sum per week; that he could not receive such benefit without making application in writing to the society, nor before two members appointed by the

¹ Irish Catholic v. O'Shaugnessey, 76 Ind. 191; Beneficial Society v. tan, 128 Mass. 437. White, 30 N. J. Law 313.

² Harrington v. Benevolent Society, 70 Ga. 340.

president had visited him and made a report to the society. A member of the society became ill, and was unable to work. He gave notice in writing of his illness to the society, and a special committee visited him and reported his condition to the society. On a day named, he was entitled to receive from the society a certain sum for two weeks' illness, which was afterward tendered to him. On that day, he resumed work at his regular employment and worked for two consecutive days, receiving his wages therefor, but during the two days he was not physically in a fit condition to work, and could only perform light work, and not even that without unreasonable, excessive and harmful exertion. During the time he was so employed, a committee of the society visited his house, and afterward reported that he had returned to work, and the committee was discharged from further duty. At the expiration of the two days, he suffered a relapse, and was unable to work for a period sufficient to make four weeks from the date of his first illness by including said two days in the computation. No notice of his illness was given to the society after the day when he so resumed work, and the society took no action thereon. He then brought an action for sick benefits. The court said: "The fact of having done some work is not the final test. The by-law must have a reasonable construction. A man recovering from an illness of about three weeks' duration may justly be deemed to be 'incapable of working,' although by unreasonable, excessive and harmful effort and exertion, he succeeds in doing light work for two consecutive days, and then, by reason thereof, suffers a relapse. That the recurrence of the plaintiff's illness was a relapse caused by excessive and harmful exertion, might fairly be inferred. The fact that he received wages for those two days is immaterial. But one report from the committee for a continuous illness is contemplated in the by-laws. Such report having been made, the plaintiff was not affected by what they did afterward, or by their discharge."¹ The constitution of a mutual benefit society provided that a member "permanently disabled from following his or her usual or other occupation" was entitled to a benefit, and in another section defined such disability as one which should "perma-

¹ Genest v. L'Union St. Joseph, 141 Mass. 417.

nently prevent the member from following any occupation whereby he or she can obtain a livelihood." In construing these provisions, it was held that the words "or other occupation" in the first mentioned section, could not be held to mean "or other of the same kind," and the definition in the latter section was conclusive against one, who, disabled in his own trade, had been working at another totally dissimilar business, —against one who, disabled from following the occupation of a barber was able to run a restaurant, or clerk in a store.¹ Where a member neglects to make a claim for sick benefits, as provided in the by-laws, his administrator may not recover them after his death.²

The measure of damages in an action for benefits is not such amount as the jurors' conscience may approve as just, but the amount provided for such a case by the laws of the society. A plaintiff can not recover for benefits accruing after the commencement of the action.³

§ 319. **Effect of expulsion on the claim of the expelled member for benefits.**—If, before a member has been expelled from a society, he becomes entitled under the contract of membership to certain benefits promised by the society, his subsequent expulsion will not prevent him from maintaining an action for such benefits.⁴ A legal expulsion, however, at once terminates the contract of membership, and determines the member's right to future benefits.⁵ Where a member makes a claim against a society for benefits, and is expelled because such claim is found to be fraudulent, the expulsion of the member for such cause is a bar to any inquiry by the courts into the merits of the claim. The society possessed jurisdiction of the subject-matter in the proceedings in expulsion, and, in expelling the member, acted in a judiciary capacity. Its decision will not be collaterally inquired into by the courts, but will be held as binding between the parties until set aside on appeal to the higher tribunals of the society, or on application

¹ *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721; see *Kelley v. A. O.* 579; 15 Atl. Rep. 885.

of H., 9 Daly 289; *Supreme Council v. Fairman*, 62 Howard Pr. (N. Y.) 442.

386. ⁵ *Pfeiffer v. Weisshaupt*, 13 Daly

² *Lucas v. Thompson*, 146 Pa. St. 151.

315; 23 Atl. Rep. 321.

for reinstatement in the courts. So long as the judgment of expulsion for presenting the fraudulent claim remains in force, the courts will regard it as settled between the member and the society, that the claim is fraudulent and without merit. The plaintiff, a member of the defendant lodge, claimed certain benefits on account of alleged disability, but the same were denied by the lodge, and he appealed to the grand master under the rules of the order, who reversed the decision of the lodge, but the lodge appealed, under the rules, to the grand lodge; and meanwhile the defendant lodge had expelled the plaintiff for fraud and deceit practiced in his efforts to receive the benefits in question, and this action of the defendant lodge was also carried by appeal to the grand lodge, and the grand lodge considered the last appeal first, and found plaintiff guilty of fraud and deceit as alleged, and sustained the action of the defendant lodge in expelling him therefor, and afterward the grand lodge further refused to consider the first appeal because the merits of the cases were involved in and determined by the decision of the second appeal. The court held that these facts constituted an adjudication of the question involved in the first appeal, to the effect that plaintiff was not entitled to the benefits claimed, and that upon a showing of these facts, the district court properly dismissed the action brought to recover the amount of such benefits from the defendant lodge.¹ Where, by the by-laws of a mutual benefit society, it is provided that if the insured member misrepresent his habits as temperate, the board of directors, upon hearing, may drop his name from membership, the action of the board upon the charge is conclusive and *res adjudicata*, and it may not be inquired into in a suit on the certificate of membership after the death of the insured.² Where a member has been expelled from a voluntary society, he may not collaterally question the rightfulness of his expulsion by a suit to recover the benefits to which he would otherwise have been entitled. He must first, if unjustly expelled, procure his restoration to membership.³

¹ Woolsey v. I. O. O. F., 61 Iowa 492; see Society v. Vandyke, 2 Md. 91; Society v. Vandyke, 2 Wharton (Pa.) 309.

³ Anacosta Tribe v. Murbach, 13 Md. 91; Society v. Vandyke, 2 Wharton (Pa.) 309; see §§ 52, 53, 319.

² Jones v. Association, 84 Ky. 110; 2 S. W. Rep. 447.

CHAPTER XXIV.

ACTION ON THE CONTRACT OF THE SOCIETY.

- § 320. Limitation as to the time when an action may be brought.
- 321. Limitation as to the place where an action may be brought.
- 322, 323. Pleading and evidence.
- 324. Competency of witnesses.
- 325. Admissibility of the declarations of a member.
- 326. Proofs of death.
- 327. Attachment of benefit fund, garnishment.
- 328. When fund may or may not be attached.

§ 320. **Limitation as to the time when an action may be brought.**—A mutual benefit society may, by proper provisions of its charter, by-laws or certificates, stipulate that any claim for benefits shall be made within a given period of time, or that no action against the society for the recovery of any claim upon the contract shall be maintained, unless commenced within a certain period after the cause of action shall have accrued. As the statutes of limitation only provide that no suit shall be brought on a claim after a certain number of years, there is nothing in these acts abridging the right of parties to contract for a shorter limitation of time. Such limitations are strictly construed and must be reasonable. Provisions of statutes of limitation relative to the bringing of a second action within a year after the reversal of the first, or after the plaintiff shall have suffered a non-suit, are irrelevant and do not apply, where a special limitation is agreed upon in the contract of insurance.¹ The contract in such a case relieves the parties from the general limitations of the statute, and, as a consequence, from its exceptions also. It is well settled that a partial payment takes the case out of the statute of limitation as to the remainder of the demand, and that as to such remainder the statute begins to run only from the date of the

¹ Howard Ins. Co. v. Hocking, 130 v. Ins. Co., 74 U. S. 386; Wilkinson v. Pa. St. 170; 18 Atl. Rep. 614; Willson Ins. Co., 72 N. Y. 499; Arthur v. Ins. v. Ins. Co., 27 Vt. 99; Riddlesbarger Co., 78 N. Y. 462.

payment. A limitation by contract is governed by the same principle. The partial payment will take the case out of the agreed period of limitation, and it will begin to run again from the time of the payment.¹

Where an insurance company does nothing to induce delay in bringing suit, the statute of limitations begins to run in its favor from the time it notifies a claimant that his claim is rejected.² Where the certificate of a mutual benefit society provides that all suits to recover benefits under it shall be begun within six months after the death of the member insured, and within that time an injunction, enjoining the beneficiary from receiving payment, prevents him from beginning suit until after the expiration of the six months, the six months' limitation no longer exists after the removal of the injunction, and suit may be brought at any time within the statute of limitations.³ This contract period does not open and expand, like the period of limitations imposed by statute, so as to receive within it a period of legal disability, and then close together at each end of that period, as though the period of legal disability had never occurred; the contract period relates to the six months next after the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to six months, made up of the days in a period of time prescribed by the statute of limitations, in which the plaintiff may commence his suit. In such a case, where a cause intervenes which prevents the plaintiff from suing before the specified contract period expires, the contract bar can not be afterward revived, but is absolutely removed, and the plaintiff is then only bound by the limitation prescribed by statute.⁴ Where the duly authorized agent of a company, before the expiration of the limitation fixed by the contract, led the beneficiary to believe that the loss would be paid without suit, and thereby induced him not to sue within that period, the limitation will be disregarded, though the contract also provides that no act of the company, its officers or agents, shall be deemed a waiver of any of its conditions,

¹ Kentucky Mutual v. Turner, 89 Ky. 665; 13 S. W. Rep. 104.

² Earnshaw v. Society, 68 Md. 465; 12 Atl. Rep. 884.

³ Railway Ass'n v. Loomis, 142 Ill. 560; 32 N. East. Rep. 424.

⁴ Semmes v. Ins. Co., 13 Wall. 158.

unless it be "in writing, signed by the president or secretary of the company."¹

If the delay to bring suit within the designated period is a result to which the society mainly contributed by holding out hopes of an amicable adjustment, it will not be permitted to take advantage of such delay; and if, after the expiration of such period, it enters into any negotiations with the beneficiary whereby it recognizes the continued validity of the certificate, it will be held to have waived its right to plead the limitation.² Repeated promises from time to time that payment or settlement will be made, and declarations that there is no need of proceeding by law to enforce payment, are a sufficient excuse for not prosecuting the claim against a society.³ If the beneficiary is induced to delay his action on a certificate by the fraud of the society, or by its holding out the reasonable hope of payment, the limitation will be disregarded.⁴ But mere negotiations for a settlement are not sufficient to show a waiver of the limitation of time.⁵ While any act which tends to mislead the beneficiary, when the parties are dealing on friendly terms in order to avoid litigation, will be held to be evidence of a waiver of a limitation specified in the contract, it must be remembered that after suit has been brought and the parties are dealing at arms-length, the rule does not apply with the same strictness, and much more positive evidence of actual misleading, if not of intent to mislead, is necessary to prove a waiver by estoppel. In an action against it, a society may omit any special defense, and make only such as it shall think sufficient to defeat the plaintiff. If it succeeds, it may urge its special defenses in a second action, for by risking its defense upon one ground, it does not waive its right in another suit to urge other grounds. Thus, a former suit on a contract of insurance was brought within sixty days after the furnishing of proofs of loss, and was held by the supreme court to be premature. In a second action it was held,

¹ Dwelling-House Ins. Co. v. Brodie, 52 Ark. 11; 11 S. W. Rep. 1016. 184; 5 t. Paul F. & M. Ins. Co. v. McGregor, 63 Texas 399.

² Martin v. Ins. Co., 44 N. J. L. 187; Jennings v. Ins. Co., 148 Mass. 61; 18 N. East. Rep. 601. ³ Derrick v. Lamar Ins. Co., 74 Ill. 404; Little v. Phoenix Ins. Co., 123 Mass. 380.

⁴ Home Ins. Co. v. Myer, 93 Ill. 271; ⁵ Allemania Ins. Co. v. Little, 20 Andes Ins. Co. v. Fish, 71 Ill. 620; Ill. App. 431. Bish v. Hawkeye Ins. Co., 69 Iowa

that the fact that the issue on which the former case was finally decided was not raised in the pleadings, so as to afford the plaintiff an opportunity to dismiss and bring a new suit after the sixty days and within the stipulated twelve months, but was held back by the society until the trial, after the twelve months had elapsed, did not waive the stipulated limitation in favor of a second action brought after the twelve months had passed.¹ Where the contract of insurance provides that no action on the contract may be maintained, "unless commenced within six months after the loss,"—"unless commenced within one year after any claim shall accrue," "unless commenced within a term of twelve months next after the loss or damage shall occur," etc.; and further provides that a loss shall not be payable until a certain time after the proofs of loss, or of death, have been furnished, the period of limitation does not begin to run until the certain time fixed after the proofs have been furnished. The limitation begins to run from the date of proof of loss or death, and not from the date of loss or death.²

Where an accident insurance company, by its certificate, undertakes to pay the insured certain amounts in case of bodily injury, and, in case of death resulting from such an injury, to pay to the wife of the insured a certain sum, and the certificate further specifies that no suit shall be brought to recover any sum unless commenced within one year from the time of the alleged accidental injury, an action may be brought on the policy by the widow of the insured more than one year after the accident, if it is brought within one year after the insured's death, since the widow's right of action does not accrue, and the prescribed period of limitation begin to run against her, until the death of the insured.³

¹ Howard Ins. Co. v. Hocking, 130 (Pa.) 86; Spare v. Home Mutual, 17 Pa. St. 170; 18 Atl. Rep. 614. Fed. Rep. 568; Friezen v. Allemania

² Steen v. Ins. Co., 89 N. Y. 315; Ins. Co., 30 Fed. Rep. 352; Vette v. May on Insurance, § 479; 2 Wood on Clinton Ins. Co., 30 Fed. Rep. 668; Insurance, pg. 1029; Cooper v. Association, 10 N. Y. Supp. 748; Hay v. but see Johnson v. Ins. Co., 92 Ill. Star Ins. Co., 77 N. Y. 235; Ellis v. 91, and Refining Co. v. Ins. Co., 12 Council Bluffs Ins. Co., 64 Iowa 507; Ont. App. 418.

Killips v. Putnam Ins. Co., 28 Wis. 334; 30 N. East. Rep. 833; affirming 472; Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85; Mutual A. & L. Ass'n v. Kayser, 14 W. N. Cas. 10 N. Y. Supp. 748.

A certificate of membership in a mutual benefit society merely stated that a certain person was a member, but named no person as beneficiary. The member died intestate, leaving a widow. The by-laws of the association provided that benefit money might be disposed of by will, otherwise to be paid to the member's widow. It was held that, as parol evidence was necessary in order to prove that the widow was entitled to the benefit money, the contract was not a written one, within the meaning of Rev. St. c. 83, § 15, which bars in five years actions on unwritten contracts.¹

§ 321. **Limitation as to the place where an action may be brought.**—It is a well settled maxim that parties can not by their consent give jurisdiction to courts where the law has not given it, and it seems to follow from the same course of reasoning that parties can not take away jurisdiction where the law has given it.² In one case it was said: "The rules to determine in what courts and counties actions may be brought, are fixed upon consideration of general concurrence and expediency by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county. It might happen that a mutual insurance company, in which every holder of a policy is a member and, of course, interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury. * * There being no authority upon which to determine the case, it must be decided upon principle. The question is not without difficulty, but, upon the best consideration the court have been able to give it, they are of opinion that it is not a good defense

¹ *Railway Ass'n v. Loomis*, 142 Ill. 560; 32 N. East. Rep. 424; *Kanz v. People's Mutual*, 6 Gray (Mass.) 185; see *Bartlett v. Union v. Great Council*, 13 Mo. App. 341; *Mutual*, 46 Me. 500; *Reichard v. Man. Carr v. Thompson*, 67 Mo. 472; *Kin- hattan Ins. Co.*, 31 Mo. 518; *Amersey v. Louisa County*, 37 Iowa. 438; *bury et al. v. Ins. Co.*, 6 Gray (Mass.) Works v. Macalister, 40 Mich. 84. 596.

to this action, that it was brought in the county of Suffolk, and not in the county of Essex.”¹ An agreement in a contract of insurance, that the insured waives the right to bring an action on it except in the courts of the state incorporating the company, is void as against public policy.² But under some circumstances and conditions limitations upon the place of bringing actions have been held valid.³

§ 322. **Pleading and evidence.**—Independent of statutory provisions, the rules of pleading are the same in their application to contracts of insurance as to other contracts. The contract, or policy of insurance, must be declared on *in hæc verba*, or according to its legal effect; the plaintiff's interest in the subject of insurance; the payment of the premium; the inception of the risk; the performance of any precedent condition, or warranty contained in the policy, and the loss or happening of the event on which, within the terms and meaning of the policy, the liability of the insurer attaches, must be alleged.⁴

The statutes in most of the states regulate to some extent the necessary averments in declaring on a contract of insurance. In a suit on a policy of life insurance, procured by the insured for the benefit of another, it is not necessary that the declaration should aver that the beneficiary had any interest in the life of the insured, but a different rule prevails where one procures an insurance on the life of another. In such a case, the plaintiff must aver in his declaration the facts showing that he had an insurable interest in the life insured.⁵ The same rule prevails in suits on contracts of insurance in mutual

¹ *Nute v. Ins. Co.*, 6 Gray (Mass.) 19 Pac. Rep. 337; *Hefferman v. Supreme Council*, 40 Mo. App. 605; *Pierce v. Ins. Co.*, 138 Mass. 151; *Britt v. Ins. Co.*, 105 N. C. 175; 10 S.

² *Reichard v. Ins. Co.*, 31 Mo. 518; *E. Rep.* 896; *Price v. Ins. Co.*, 17 see *Matt v. Association*, 81 Ia. 135; *Minn.* 497; *McLean v. Society*, 100 46 N. W. Rep. 857. *Ind.* 127; *Mutual Benefit v. Cannon*,

³ *Boynton v. Middlesex Mutual Fire Ins. Co.*, 4 Met. (Mass.) 212; *Arnet v. Milwaukee Mutual*, 22 Wis. 516. *48 Ind.* 264; *Excelsior Mutual v. Riddle*, 91 Ind. 84; *Richards v. Ins. Co.*, 80 Cal. 505; *Phoenix Ins. Co. v. Rad-*

⁴ The rule is thus concisely laid down in *Brooklyn Ins. Co. v. Bledsoe*, 52 Ala. 538; see also *Kaw Life Association v. Lemke*, 40 Kan. 142; *Ind.* 380. *120 U. S.* 183. ⁵ *Guardian Mutual v. Hogan*, 80 Ill. 35; *Franklin Life v. Safton*, 53

benefit societies. A stranger who obtains a membership for another in any such society, where the membership secures to him an insurance upon the life of the member, must aver and prove the facts showing an insurable interest in the life of the member.¹ In suits upon a policy payable to a stranger, it is proper to leave it to a jury to say whether, under all the circumstances of the case, the contract was entered into by the parties in good faith, or as a means of procuring a wager upon life.² The mere payment of premiums by the beneficiary is not conclusive evidence that the policy was taken out by him.³ Evidence tending to show that the beneficiary of a contract of insurance procured insurance to be effected on the life of the member in other societies, is admissible to show that the object was to defraud the society.⁴

Where the interest of each beneficiary in the fund is a several interest, one may sue without making the others parties to the proceeding. In such a case separate actions may be maintained, even though the promise to pay is to the beneficiaries jointly.⁵ Where a policy of insurance provides for the payment of different sums to different persons, it is improper for beneficiaries to join in one action to recover the several sums due, but, if they do, the court may order each beneficiary to file his separate petition, and defendant to answer each, without further service of process.⁶ A contract of insurance in a mutual benefit society provided that the money should be payable, in case of a member's death, to his wife,

¹ *Elkhart Mutual v. Houghton*, 98 Ind. 149.

² *Conn. Mutual v. Schaefer*, 94 U. S. 457; *Ætina Life v. France*, 94 U. S. 561; *Swick v. Home Life*, 2 Dill. 160; *Langdon v. Union Mutual*, 14 Fed. Rep. 272.

³ *Tuston v. Hardey*, 14 Beav. 232; *Armstrong v. Mutual Life*, 13 Rep. 71.

⁴ *Whitmore v. Supreme Lodge*, 100 Mo. 36; 13 S. W. Rep. 495; *Ins. Co. v. Armstrong*, 117 U. S. 598; 6 Sup. Ct. Rep. 877. In the last case it was said: "A repetition of acts of the same character naturally indicate the same purpose in all of them; and, if when

considered together, they can not be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act."

⁵ *Emmeluth v. Association*, 122 N. Y. 130; 25 N. East. Rep. 234; 1 Add. Cont. 79; 1 Pars. Cont. 11; *Van Wart v. Price*, 14 Abb. Pr. 4, note; *Hees v. Nellis*, 1 Thomp. & C. 118; *Eccleston v. Clipsham*, 1 Saund. 153. The words "share and share alike" are words of severance, and create a several right. *Emmeluth v. Association*, *supra*; affirming 46 Hun 681.

⁶ *Keary v. Mutual Reserve*, 30 Fed. Rep. 359.

her executors, etc., as directed by said member in his application, "or to such other person or persons as he might subsequently direct by will or otherwise." In an action on the certificate by the wife, it was held that she need not allege in her complaint that the deceased member had not directed the money to be paid to any other person, as that was a matter of defense.¹ Under the constitution of a mutual benefit society, which provides that the benefits shall be paid to the nearest relatives of the deceased, an allegation in the statement of claim that plaintiffs are the father and mother of deceased, "and his nearest relatives," is sufficient, without stating that deceased did not leave a widow, child, or children him surviving.² Where a member has attempted to change the designation of his beneficiary, and the original beneficiary brings suit on the certificate, he must aver and prove that the change attempted to be made was invalid.³ Where a benefit certificate is made payable to a certain person in its inception, the burden of proof is upon parties claiming an assignment of such certificate to them to show a *prima facie* valid transfer of the benefit accruing from said certificate to themselves, in pursuance of the constitution and by-laws of the order.⁴

In a suit on the by-laws of a society for benefits, plaintiff must state how the obligation to pay money arises, what the rules and regulations are, and that he has complied with them. A statement of demand, claiming a balance to be due during plaintiff's sickness at the rate of \$3 per week, "the sum paid by the society to the sick of the society," does not contain a legal cause of action.⁵ The burden is on the defendant to aver and prove the falsity of any statement in the application, or that the contract was issued contrary to the by-laws or rules of the society, and this is true although the by-laws, rules and application may be set out in full in the complaint or declaration, and whether the answers in the application are representations or warranties. There are cases in

¹ Landenschlager v. Association, 36 Minn. 181; 30 N. W. Rep. 447; Dennis v. Ins. Co., 84 Cal. 570; Tripp v. Ins. Co., 55 Vt. 100; Coburn v. Ins. Co., 145 Mass. 236.

³ Masonic Mutual v. Burkhart, 110 Ind. 189; 11 N. East. Rep. 449.

⁴ Henry v. Grand Lodge, 15 Ill. App. 151.

⁵ Beneficial Society v. White, 30 N.

² Sherry v. Union, 139 Pa. St. 470; J. Law, 313. 20 Atl. Rep. 1062.

conflict with this rule, but it is undoubtedly supported by the later and better authorities as well as by the better reason.¹ In *Piedmont Ins. Co. v. Ewing*, *supra*, it is said: "The number of questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover are such that it may be safely said no sane man would ever take a policy, if proof, to the satisfaction of a jury, of the truth of every answer were made known to him to be an indisputable prerequisite to payment of the sum secured; that proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of the statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable ground to make such an issue, he can show the facts on which it is founded." In a suit upon a contract of insurance, where the issue is as to the truth of the answers of the insured in his application, the possible action which the company might have taken, if the insured had answered otherwise than he did, is inadmissible.² In an action on a mutual benefit certificate, made part of the petition, when defendant pleads a general denial, and the benefit certificate is not introduced in evidence, a judgment for plaintiff will be reversed for want of evidence.³

It is not a defense to an action on a contract of mutual benefit insurance that the beneficiary has delayed the bringing of the suit, that under the laws of the society the amount of the certificate, if payable, must be paid by assessment on the members existing at the time of the member's death and on them only, that more than one thousand persons who were then members have, by death or otherwise, ceased to be such, and that several thousand other persons have since become members. Assessments to pay death losses operate with reasonable equality upon all the members. If a new member

¹ *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377; *Continental Life v. Rogers*, 14 S. W. Rep. 922, 119 Ill. 474; 10 N. East. Rep. 242.

² *N. W. Association v. Hall*, 113 Ill. 169; 8 N. East. Rep. 764.

³ *Knights v. Fortson*, 78 Texas 475;

is assessed to pay an old loss, the probability is that he will escape assessments made after he ceases to be a member for losses accruing before he ceased to be such.¹

§ 323. Where the plaintiff's right of recovery is dependent upon the fact that the deceased member was in good standing in the society at the time of his death, the burden of proof is on the plaintiff to show such good standing of the member.² In an action upon a certificate of membership, reciting that the deceased was a "beneficiary member in good standing" in the society, and that upon his death a sum would be paid "provided he be in good standing when he dies," the certificate is proof of the good standing of the party named at the time of its issue, and such standing will be presumed to have continued, in the absence of contrary evidence. In such case, the burden is on the society to show that, by reason of his conduct, or his failure to comply with the regulations or requirements of the society, the deceased had lost his good standing.³ Proof that the society recognized the decedent as a member up to a short time before his death, in connection with the presumption that all persons follow such laws, rules and regulations as they are subject to, is sufficient evidence of the good standing of decedent to maintain the action.⁴ When the by-laws of a society provide that the quarterly dues shall be payable "on or before the first meeting in each quarter" in order to show that the member is not in good standing by reason of not having paid his dues for a certain quarter, it must be shown that a meeting has been held since the commencement of the quarter. Testimony that the society holds meetings every week is not enough.⁵ In an action to recover benefits from a society by one who claims that he is a member, the evidence of its medical examiner that plaintiff had never been examined by him as required by its rules is admissible.⁶

¹ Bachmeyer v. Association, 82 Wis. 255; 52 N. W. Rep. 101.

² Siebert v. Chosen Friends, 23 Mo. App. 268.

³ See §§ 251, 252; Millard v. Supreme Council, 81 Cal. 340; 22 Pac. Rep. 864; Mills v. Rebstock, 29 Minn. 380; Supreme Lodge v. Johnson, 78 Ind. 111; Stewart v. Supreme Council, 36 Mo. App. 319; Mulroy v. Su-

preme Lodge, 28 Mo. App. 463; Forse v. Supreme Lodge, 41 Mo. App. 107; Elmer v. Association, 19 N. Y. Supp. 289.

⁴ Lazensky v. Supreme Lodge, 31 Fed. Rep. 592.

⁵ Mills v. Rebstock, 29 Minn. 380; §§ 285, 286.

⁶ B. & O. Ass'n v. Post, 122 Pa. St. 579; 15 Atl. Rep. 885.

Where the by-laws provide that a member may at any time withdraw from the society by giving notice in writing of his intention to do so, a written notice of withdrawal by the member will sever his relations with it, though the society does not accept his resignation, or erase his name from its roll of members.¹

In an action on a contract of insurance, where the question of membership in the society is in issue, evidence showing that the deceased was not a member is admissible, though his resignation is not pleaded.² Where the circumstances attending the admission of deceased to the benefits of a certificate of insurance were fully shown by the testimony of the secretary of the insurer, a refusal to admit in evidence the minutes of a meeting of the insurer at the same time was not erroneous.³ A provision of a certificate, that it shall be payable only on its surrender, is waived where the society refuses to pay solely on the ground of non-payment of assessments.⁴ In an action on a contract of insurance issued by a mutual benefit society, proof by the society of its custom and usage in the management of its affairs and the payment of the assessments, and of the decisions of its officers respecting the construction of the contract, are inadmissible.⁵ In actions on certificates of membership issued by mutual benefit societies designed to secure the payment of money to those dependent upon their members, after the death of such members, courts should construe the rules and regulations of such societies liberally to effect the benevolent objects of their organization, and that doctrine of construction is applicable generally to rulings on questions of evidence, as well as in other respects.⁶

§ 324. **Competency of witnesses.**—In Georgia, it was held that under the statute of that state relating to competency of

¹ *Cramer v. Masonic Ass'n*, 9 N. Y. Knights of Pythias, 31 Fed. Rep. 122; Supp. 356; see § 32. *Bauer v. Samson Lodge*, 102 Ind. 262;

² *Cramer v. Ass'n*, *supra*.

³ *Grossman v. Supreme Lodge of Franklin Ins. Co. v. Humphrey*, 65 Knights and Ladies of Honor, 6 N. Y. Ind. 549; *Davidson v. Supreme Lodge*, S. 821. 22 Mo. App. 263.

⁴ *Himmelein v. Supreme Council* ⁶ *Supreme Lodge v. Schmidt*, 98 (Cal.), 33 Pac. Rep. 1130. Ind. 374; *Erdmann v. Order Her-*

⁵ *Manson v. Grand Lodge*, 30 Minn. man's Sons, 44 Wis. 376; *Supreme* 509; 16 N. W. Rep. 395; *Wiggin v. Lodge v. Abbott*, 82 Ind. 1.

witnesses, where the contract in issue had been made between an incorporated mutual benefit society and a member, and the latter had died, the officer or agent entering into the same in behalf of the corporation was an incompetent witness; but that the other members of the society were competent.¹

In an action on a contract of mutual benefit insurance by the beneficiary, to whom it is payable in express terms, members of the society, who are subject to assessment to pay mortuary benefits, are not incompetent witnesses under a statute which declares that where any party to a contract is dead, and his rights therein have passed to the litigant who represents his interest, no person whose interest is adverse to such decedent shall be a competent witness as to any matter occurring before the death. In such a case the deceased never had any right to the fund. It is payable to the beneficiary, if payable to any one, and he takes in his own right under the contract, and not as the representative of the deceased.² The officers of the society are competent witnesses to testify as to the giving of a notice of assessment.³

§ 325. **Admissibility of the declarations of a member.**—

In ordinary life insurance, where the contract is between the company and the beneficiary, where a vested interest passes to the beneficiary and the assured ceases to be a party in interest, it is held that the admissions of the assured after the issuing of the policy are not admissible to defeat the contract.⁴ The reason upon which the rule is founded is that, after the contract of insurance is effected, the assured has no such relation to the beneficiary as gives him the power to affect or destroy

¹ Georgia Masonic v. Gibson, 52 Ga. 640. Ohio St. 292; Hurd v. Masonic Mutual, 6 Ins. L. J. 792; Mobile Life v.

² Hamill v. Supreme Council, 152 Pa. St. 537; 25 Atl. Rep. 645.

³ Reichenbach v. Ellerbe, 115 Mo. 588; 22 S. W. Rep. 572; Bates v. Forcht, 89 Mo. 121; 1 S. W. Rep. 120; 1 Greenleaf Ev. 416.

⁴ Swift v. Mass. Mutual, 63 N. Y. 186; Eddington v. Mutual Life, 67 N. Y. 185; Dilleber v. Home Life, 69 N. Y. 256; Fitch v. Ins. Co., 59 N. Y. 557; Rawle v. Ins. Co., 27 N. Y. 282; Fraternal Mutual v. Applegate, 7

Morris, 3 Lea 101; Washington Life v. Haney, 10 Kans. 525; Penn Mutual v. Wiler, 100 Ind. 92; Kline v. Association, 111 Ind. 462; Valley Mut. Life Ins. Co. v. Burke, 12 Ins. L. J. 337; Reid v. Ins. Co., 58 Mo. 421; Valley Mutual v. Tewalt, 79 Va. 421. The declarations of the assured were held to be admissible in Kelsey v. U. S. Ins. Co., 35 Conn. 225; Aveson v. Lord Kinnard, 6 East. 188.

it by his statements. But in contracts of mutual benefit insurance where the contract is between the society and the member, where the beneficiary has only an expectant interest, and the member insured has full power and dominion over the contract until the moment of his death, it has been held that the reason for the rule in ordinary insurance does not exist, and that there is no escape from the conclusion that, since the beneficiary has no vested interest in the contract, the member must have dominion over it, and that his declarations are admissible against the beneficiary just as they would be against his legal representatives.

In *Smith v. National Benefit Society*,¹ the insured member had declared that he had taken out the insurance with intent to commit suicide. Upon the admissibility of this evidence the court said: "The deceased had the right, with the consent of the company, to change his beneficiary from time to time, without the consent of such payee or beneficiary. * * * The plaintiff got no separate standing by the designation under the policy before the date of the death. Before that, the sole right was in (the member). The deceased, by his designation of plaintiff as beneficiary, did not make a case to exclude evidence of his declaration. He stood as owner until he died, and the plaintiff was in no better condition in respect to the policy than if the plaintiff's representative had brought the action. The case is therefore different from the class of cases which hold that evidence of the declaration of an assignor can not be received to impeach the title of the assignee."² It has been held, however, that in mutual benefit insurance the beneficiary of a certificate is in legal contemplation the owner of it, subject only to the right of the member to substitute other beneficiaries, and that the admissions of a member made after the issuing of the certificate can not affect the validity of the contract. This view was taken in *Supreme Lodge v. Schmidt*,³ where the court said: "Hanson was also called as a witness, and counsel for the defendant offered to

¹ 51 Hun 575; 4 N. Y. Supp. 521; *hausen v. Association*, 13 N. Y. Supp. 22 N. Y. St. Rep. 852; affirmed, 123 36; *Stewart v. Supreme Council*, 36 N. Y. 85; 25 N. East. Rep. 197. Mo. App. 319; *Nix v. Donovan*, 18

² See, also, *Maynard v. Vanderwerker*, 24 N. Y. Supp. 932; *Stein-* N. Y. Supp. 435.
³ 98 Ind. 374.

show by him that between the 21st and 25th days of August, 1879, he accompanied Schmidt, the decedent, to the office of the supreme master of exchequer, at the time he went to see about getting reinstated, and that he, Schmidt, there admitted in the presence of Stumph that he had received notice of assessment No. 8, in contest, that he had not paid that assessment, and that he had been suspended for its non-payment. If this action had been upon an ordinary life insurance policy the decision of the court excluding what was proposed to be proven by Hanson would have been fully sustained by the authorities. This is conceded by counsel for the appellant, but it is insisted that the provision in the certificate before us, authorizing Schmidt to make a different disposition of the proceeds by 'will or otherwise' takes it out of the rule applicable to ordinary life insurance policies, recognized as above, and requires us to consider Schmidt as having been the real owner of the certificate until the time of his death; that Schmidt being thus the real owner of the certificate at the time fixed in the offered evidence, it was competent to prove admissions made by him affecting its validity as a chose in action. * * * From the time of the issuance of the certificate until Schmidt's death" (the beneficiaries named in the certificate), "were, in legal contemplation, the owners of it, subject only to the right of Schmidt to ultimately substitute other beneficiaries by will, or in such other manner as the rules and regulations of the order might permit. But this right to ultimately substitute other beneficiaries did not empower Schmidt to destroy the value of the certificate in the hands of the appellees by merely hearsay or irrelevant admissions concerning matters in issue between other parties. Schmidt having never exercised the right of substitution reserved to him, we are justified in assuming that he never intended to exercise it, and that as between the appellees and the order, the former have been the absolute owners of the certificate ever since it was issued. We are, consequently, unable to hold that the alleged admissions of Schmidt to Hanson in the presence of Stumph, were any more admissible as evidence in the case in hearing than they would have been in an action upon a life insurance policy issued in the usual form. In actions upon life policies, or certificates of member-

ship issued by mutual societies designed to secure the payment of moneys to those dependent upon its members after the death of such members, courts should construe the rules and regulations of such societies liberally to effect the benevolent objects of their organization, and that doctrine of construction is applicable generally to rulings on questions of evidence, as well as in other respects."

In an action on a certificate of indemnity, alleged to have been procured through fraudulent misrepresentations of the assured, a witness stated that she had known deceased four or five years prior to her death, and had "long ago" conversed with her about her health. It was held that the evidence was incompetent to prove declarations by decedent, as being too remote from the time of her examination by the physician of the insurer.¹ In an action by a beneficiary on a certificate issued to a member of a mutual benefit society, an application for reinstatement, made by the member, is not competent evidence to prove the fact of his suspension. A member may in any controversy with the society seek to avoid litigation, and his application will be considered as an attempt to have his rights recognized by the society. Whether or not his rights have been forfeited depends upon the facts in the case and the provisions of the contract, not upon the act of one of the parties in attempting to adjust the controversy or upon the opinion of one of the parties as to the validity of the forfeiture. The statement of a member that he had been suspended for non-payment of an assessment, is not sufficient evidence to prove that fact.² If the fact of his suspension for non-payment is

¹ *Grossman v. Supreme Lodge*, 6 N. Y. S. 821; see *Swift v. Ins. Co.*, 63 N. Y. 186; section 18 of chapter 175 of the laws of 1883, provides that "membership in any corporation, association, or society transacting the business of life or casualty insurance, or both, upon the co-operative or assessment plan, shall give to any member thereof the right at any time, with the consent of such corporation, association, or society to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficia-

ries." This law governed the cases of *Smith v. Society*, *supra*, and *Steinhansen v. Association*, *supra*, but it does not appear whether that statute was applicable to the *Grossman case*. As to declarations of the insured in connection with an established fact, see *Union Central v. Cheever*, 36 Oh. St. 201; *Schwarzbach v. Union*, 25 W. Va. 622; *Valley Mutual v. Tewalt*, 79 Va. 421; *Edington v. Ins. Co.*, 67 N. Y. 185; *Reid v. Ins. Co.*, 58 Mo. 421, *Swift v. Ins. Co.*, *supra*.

² *Mutual Reserve v. Hamlin*, 139 U. S. 297; 11 Sup. Ct. Rep. 614; *Dodge*

proved, his declarations are competent to show that he had knowledge of the fact.¹ A petition for reinstatement reciting that the member has been suspended for non-payment of a certain assessment, is a waiver of any formal defect in the notice of that assessment.² Evidence of a member's oral declarations made after he had received his certificate, is inadmissible to vary its construction, and his mere statement that it is intended for the benefit of a certain person, is insufficient to constitute a trust in favor of that person.³

§ 326. **Proofs of death.**—The furnishing of proof of the death of the member is usually made a condition precedent to the liability of the society upon its certificate. Preliminary proofs of death furnished to the society are evidence of the compliance by the beneficiary with the terms of the contract, but they are not evidence of the facts set forth in them. They may not be used in an action on the contract to sustain the issue on the part of the plaintiff. The statements made in them may be used against the beneficiary as admissions against his interest, but he is not estopped by any such statements to show the facts. The most that can be said is that, having made the statements, the burden is upon him to show that they were made inadvertently or by mistake.⁴

v. Friedman's Co., 93 U. S. 379; Larensky v. Supreme Lodge, 31 Fed. Rep. 592; Supreme Lodge v. Schmidt, 98 Ind. 379; 1 Greenl. Ev. at section 171; see § 294;

¹ Dilleber v. Ins. Co., 69 N. Y. 256; Hansen v. Supreme Lodge, 140 Ill. 301; 29 N. East. Rep. 1121.

² Hansen v. Supreme Lodge, *supra*.

³ Eastman v. Provident Mutual, 62 N. H. 555; 65 N. H. 176; 20 Cent. Law Journal, 266; Wason v. Colburn, 99 Mass. 342; Supreme Council v. Morrison, 16 R. I. 468; 17 Atl. Rep. 57.

⁴ N. Am. Ins. Co. v. Burroughs, 69 Pa. St. 43; 1 Ins. L. J. 90; Dougherty v. Ins. Co., 154 Pa. St. 385; 25 Atl. Rep. 739; Keels v. Mutual Association, 29 Fed. Rep. 198; American Ins. Co. v. Day, 39 N. J. L. 89; Maher v. Ins. Co., 67 N. Y. 283; Spencer v. Ins. Co., 23 N. Y. Supp. 179; Mutual Ben. Ins.

Co. v. Newton, 89 U. S. (22 Wall.) 38; Home Benefit v. Sargent, 142 U. S. 691; 12 Sup. Ct. Rep. 332; 31 Fed. Rep. 711; Germania Ins. Co. v. Curran, 8 Kan. 9; Hubbard v. Ins. Co., 33 Iowa 325; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; but see Campbell v. Ins. Co., 10 Allen 213, and Irving v. Ins. Co., 1 Bosw. 507, where it was held that the assured is bound by the statements contained in his preliminary proofs, and will not be permitted to contradict them, unless he notifies the company of the error before the trial of the case. The requirement in a certificate that the insurer shall be furnished with "satisfactory proof of the death" of the assured does not entitle it to demand information as to the cause of his death. See § 156.

Where there is nothing in the contract requiring the notice of death to state its cause, plaintiff need only prove the death at the trial, since the cause is a matter of defense; but, where the physician who attended the deceased, during his last illness certified to a cause of death, which, if true, would have defeated a recovery, that part of his certificate stating the cause of death must be admitted in evidence, not as independent evidence of any fact in the case, but in connection with the circumstances of its transmission to the society, as an admission that the fact alleged is true. It is not incompetent evidence under a statute providing that a physician shall not be permitted to disclose any information which he acquired in attending a patient in a professional capacity.¹ Where the contract of insurance does not require the claimant to furnish proof of the cause of death, an infant beneficiary is not bound by the admission of his guardian, who, in furnishing the proofs of death, voluntarily included the attending physician's certificate of the cause of death, which showed that the insured died from one of the excepted causes.

A sworn statement by a widow in proofs of death, that her husband committed suicide while insane, does not estop her to show that she made the statement on the faith of what others told her, and not from actual knowledge, and that he took poison by mistake.² In the absence of a statutory or constitutional provision making other evidence competent, nothing but common law evidence may be introduced in an action on an insurance contract, and where there is no rule making the records or books of the board of health evidence as to the cause of death in the trial of an action at law, when that question is material, such records or books are inadmissible.³ Where a policy provided for due notice and proof of the death of the insured, and of the just claim of the claimant, and the society had paid the amount of the policy to a party not entitled by law to its benefits, he having presented proofs of the death of the insured to the society, and afterward the rightful

¹ Buffalo Trust Co. v. Aid Association, 126 N. Y. 450; 27 N. East. Rep. 942; Goldschmidt v. Ins. Co., 102 N. Y. 486; 7 N. East. Rep. 408; Ins. Co. v. Rodel, 95 U. S. 232; see Muller v. Germania, 18 N. Y. Supp. 794; Bantz v. N. W. Association, 40 Minn. 202.

² Bachmeyer v. Association, 82 Wis. 255; 52 N. W. Rep. 101.

³ Buffalo Trust Co. v. Aid Association, *supra*.

beneficiary made proof by affidavit of the death of the insured, and of his own just claim, a general objection by the society to the sufficiency of the proofs is not good. The court said: "As the proofs of the death of the insured already in possession of the defendant had been accepted by them as satisfactory, there is no merit in the contention of the defendant, that the plaintiffs have failed to comply with the terms of the policy in this respect. If the defendant has not already waived any proof of death by claiming that they had paid the loss to the person entitled, they did waive further proof than the affidavit by failing to specify any grounds of objection to it in form or substance."¹ Preliminary proof of death may be waived by a mutual benefit society.² Where, by the terms of the contract, the society is not bound to levy an assessment to meet a death loss, until sixty days after due proof of the death has been made, a declaration or complaint which fails to state that such proof has been made, is defective.³ Where an attempt is made to aver notice and proof of death, as required by a certificate in a mutual benefit society, it may be aided by an averment that the society is in default for not paying the benefit according to the terms of the certificate.⁴

Where proofs of death of the assured have been made, and the society retains them without suggesting any defect in the proof, and finally wholly refuses to pay the claim, it thereby waives any defect in the formal proof of death and acknowledges that the requisite proofs were received by it. But such proof must be to such a degree formal as to show that it is intended to be the preliminary proof of death. Where such proof has not been furnished as required by the contract, a refusal of the society to pay on other grounds, before the time for making proofs has expired, is a waiver of this requirement.⁵ Where a by-law of a mutual benefit society provides

¹Timayenis v. Union Mutual, 21 Fed. Rep. 223; Wuesthoff v. Germania Co., 107 N. Y. 580, overruling 52 Superior Ct. 208.

²Covenant Mutual v. Spies, 114 Ill. 463.

³Taylor v. Relief Union, 94 Mo. 35; 6 S. W. Rep. 71.

⁴National Association v. Grauman, 107 Ind. 288; 7 N. East. Rep. 233.

When disappearance is evidence of death. Braunstein v. Ins. Co., 31 L. J. R. Q. B. 17; Prudential Ins. Co. v. Edmunds, 2 App. Cas. 487; John Hancock Ins. Co. v. Moore, 34 Mich. 41; Tisdale v. Ins. Co., 28 Iowa 12; Travelers Ins. Co. v. Sheppard, 85 Ga. 751; 12 S. E. Rep. 18.

⁵Metropolitan Association v. Windover, 137 Ill. 417; 27 N. East. Rep.

that upon receipt of notice of death of a member the secretary shall immediately forward to the beneficiary the proper blanks, and full instructions how to make proofs of death, and the society, upon notice of the death of a member, with a request to send the blanks and instructions as to the required proof, refuses to send the same on the ground that the decedent had failed to pay his assessments, and had ceased to be a member before his death, this refusal to send the blanks and instructions is a waiver of the preliminary proof of death.¹ The laws of a society made it the duty of the secretary of the subordinate lodge, on the death of a member, to notify the supreme council thereof, in accordance with a form provided by it, containing particulars, many of which could ordinarily be known only to an officer of the lodge, and provided that proofs for benefits should be passed on by the subordinate lodge and then by the supreme council. Under these laws, it was held that all a claimant had to do was to notify the subordinate lodge of the death of the member, and the duty was then put on it of furnishing proof of death to the supreme council.² Where the constitution and by-laws of a mutual benefit association do not require the beneficiary to make proofs of death of a member, the failure of the subordinate lodge to make a report of the cause of death of a member, as required by the constitution and by-laws, does not affect the right of the beneficiary to recover.³

The obstinate and unjust refusal of a physician to furnish a certificate of the cause of the death of the member, so that those interested are thereby prevented from complying with a condition of the contract, can not deprive them of the right to enforce the policy.⁴

§ 327. **Attachment of benefit fund—Garnishment.**—In treating of the question as to who may by contract legally

538; *Lazensky v. Supreme Lodge*, 31 Fed. Rep. 592.

² *Anderson v. Supreme Council Chosen Friends*, 135 N. Y. 107; 31 N.

¹ *Covenant Mutual v. Spies*, 114 Ill. 463; *Kansas Protective Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 27; ³ *Supreme Council v. Boyle* (Ind. Grattan v. Ins. Co., 80 N. Y. 281; App.), 37 N. East. Rep. 1105.

Evarts v. Association, 16 N. Y. Supp. 27; *Meagher v. Union*, 20 N. Y. Supp. 247. ⁴ *O'Neill v. Massachusetts Ass'n*, 18 N. Y. Supp. 22.

acquire the benefits of a certificate of insurance in a mutual benefit society, it is proper also to inquire whether those benefits may be reached by third parties by process of law. As a general rule, when the preliminary proofs of death, the making of which is a condition precedent to a recovery upon a life insurance policy, have been made, the amount due and owing to the beneficiary may be reached by attachment and garnishment in the same manner, and to the same extent, as other choses in action. In *Girard Ins. Co. v. Field*,¹ it was held that where a loss had occurred under the policy of insurance, a garnishment would lie against the fund, whether proofs of loss had been made, or not, at the time garnishee process was served, and that the simple operation of the garnishee process was to place the plaintiff in the garnishee proceedings into the same relation with the company that the defendant would have held, but for the proceedings in garnishment.² Several cases, however, hold that the proceeds of a policy of insurance can not be made the subject of attachment or garnishment proceedings until such preliminary proofs have been made. They base their view upon the theory that, as the liability of the company does not ripen into an indebtedness by the mere lapse of time, but upon the performance of some act by the other party to the contract, the company may, until such act has been performed, properly say that there is nothing due the beneficiary upon the policy.³

§ 328. **When benefit fund may or may not be attached.**—While, with regard to ordinary life insurance contracts, the rule is undoubtedly as above stated, it has, nevertheless, been held that contracts of insurance in mutual benefit societies can not be made the subject of attachment or garnishment proceedings. This immunity of the fund from such proceedings arises, if at all, from the provisions of the law providing for the organ-

¹ 45 Pa. St. 129.

² *Hanover Ins. Co. v. Connor*, 20 Ill. App. 297.

³ *Lovejoy v. Ins. Co.*, 11 Fed. Rep. 63; *Martz v. Ins. Co.*, 28 Mich. 201; *Bishop v. Young*, 17 Wis. 46. A policy of life insurance, payable to the legal representatives of the assured is not subject to attachment proceedings during his life. *Day v. Ins. Co.*,

111 Pa. St. 507. As to the rights of an assignee of an insolvent in a policy payable to his executors, administrators or assigns, see *In re McKinney*, 15 Fed. Rep. 535; *Brigham v. Ins. Co.*, 131 Mass. 319; *Bassett v. Parsons*, 140 Mass. 169; *Heyman v. Dubois*, 13 L. R. Eq. 158; *In re Russell's Policy Trusts*, 15 L. R. Eq. 26.

ization of such societies. A law of Massachusetts enacts that a corporation organized under it may "provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process." In construing this provision of the law, the court said: "In view of the object of these beneficiary corporations, of the limited number of persons for whose benefit they are intended, of the fact that the member of the corporation could not provide for his creditors by a benefit certificate, or dispose of the fund by testamentary bequest, we can not doubt that the fund due on the certificate is not subject to the attachment while it remains in the hands of the corporation. If it were, it would be impossible for the member, in many instances, to provide for those for whom it was contemplated that he should, by this method, be able to make provisions." The court held that, upon the death of the husband, the wife's interest in the benefit fund could not be attached in the hands of the society for her debt.¹

In another case² it was held that a certificate of membership in a mutual benefit society, payable to the widow of a member, is for the benefit of the member's family, and can not be seized, upon the death of a member, by the widow's creditors, where the charter of the association provides that the funds shall be for the relief of the member's family, and shall be exempt from seizure under execution or other legal process, to pay any debt of the deceased member. This construction was given to this provision of the charter, on the ground that it harmonized with the legislative action upon the subject, as well as with the rule which, when applied to such organizations, requires a liberal construction of their charters in favor of the objects of their bounty, and to prevent the application of their funds to the benefit of those who are strangers to the organization. The charter of a society provided: "No part of the stock or interest, which any member, or his

¹ Saunders v. Robinson, 144 Mass. 306; 10 N. East. Rep. 815; see Breckel v. Imperial Council, 11 N. Y. Supp. 321. ² Schillinger v. Boes, 85 Ky. 357; 3 S. W. Rep. 427; see Vilbon v. Mar-souin, 18 Lower Can. Jurist. 249; Brown v. Balfour, 46 Minn. 68.

widow, or children may have in said *institution*, shall be subject to any debt, liability, or legal or equitable process against him, or any of them." A member died, and his son became entitled to \$100 as a beneficiary of his certificate. A creditor of the son levied upon that sum in the hands of the society by attachment, and it was held that the money was subject to such attachment. The court said: "The money due to the representatives of a deceased member, is in no sense an interest 'in said institution.' It is a debt due from it to them, not as shareholders, but as creditors."¹

In *Hankinson v. Page*,² it was held that the interest of an heir at law of a deceased member of a mutual benefit society, in a sum to be raised and paid by the society on the death of a member, was attachable in New York. In this case, it was insisted that the demand against the society was in the nature of equitable assets, and, therefore, could not be attached, but, upon this point, the court said: "Although an attachment is a special remedy at law, and, in the absence of statutory authority, does not reach property or interests which can only be realized by the assistance of a court of equity, the tendency of legislation in this country has been to enlarge the operation of the writ, and subject interests and kinds of property to seizure under an attachment, which are not subject to execution at law."³ The court held that, as the beneficiary could maintain a suit at law to enforce the contract against the association, and was not compelled to resort to equity, the point was not well taken. Where the law under which a mutual benefit society is organized provides that the benefit fund shall be exempt "from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of such deceased member," the fund, after it has been received by the beneficiary, is not exempt from the claims of the creditors of such beneficiary.⁴

¹ *Geiger v. McLin*, 78 Ky. 232.

⁴ *Bolt v. Keyhoe*, 30 Hun 619;

² 31 Fed. Rep. 184.

Crosby v. Stephan, 32 Hun 478.

³ *Drake on Attachment at Sec. 7.*

CHAPTER XXV.

ACTION ON THE CONTRACT OF THE SOCIETY.

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- 335. Pleading, evidence, breach of promise to pay.
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§ 329. **Plans and schemes of mutual benefit insurance.**
—Each mutual benefit society has its own form of contract of insurance. While these contracts differ in detail, they seem to be formed upon three general plans. First. Where the society agrees, on certain conditions, to pay a certain sum of money on the death of a member. Second. Where the society agrees to pay, on certain conditions, as many dollars as there are members of the society in good standing at the time of the death of a member. Third. Where the society agrees, on certain conditions, on the death of a member, to levy an assessment upon its members in a certain sum of money, and to pay the proceeds of such assessment to the beneficiary of the member. Actions upon certificates issued under the first plan, where the agreement is to pay a fixed sum of money to the beneficiary of a member dying in good standing, are governed by the same principles which obtain in suits upon ordinary

insurance policies. Concerning actions upon certificates issued under the second plan, where the society agrees to pay to the beneficiary of a member dying in good standing as many dollars as there are members of the society at the time of his death, little need here be said. There is nothing in such a contract suggestive of the idea that defendant's liability is dependent upon collections received from an assessment, and a complaint or declaration upon it states a cause of action, although it neither alleges the actual receipt of money upon an assessment to meet the loss, nor a neglect to make such assessment.¹ Parol evidence is admissible to show the number of members of the society at the death of the deceased member, in order to ascertain the sum recoverable under the contract.² Where the society agrees, on the death of a member in good standing, to levy an assessment of a certain sum of money on each surviving member of the society, and to pay the proceeds thereof to the beneficiary of the member, many questions may arise. In the first place, let us inquire whether *mandamus* is the proper remedy for a breach of the contract.

§ 330. **Mandamus as a remedy.**—In the lower courts, the point is often made that the proper proceeding upon such a certificate of membership is neither by suit at law nor bill in equity, but is by *mandamus* to compel the officers of the society to make an assessment. But this point has seldom been pressed in courts of last resort, for an investigation readily shows that it is not well taken. It is elementary that a court has no jurisdiction by *mandamus* to compel the performance of executory contracts, and especially is this the case where, in the performance of such contracts, discretion and judgment must be exercised.³ It is also laid down as the rule, both in this country and in England, that where a party has another specific legal remedy he may not resort to a proceeding by mandate. It has been held, upon this ground, that the beneficiary may not resort to such a proceeding.⁴ In discussing the

¹ Neskern v. Association, 30 Minn. People, 85 Ill. 396; High Ext. Rem. 406; see Curtis v. Ins. Co., 48 Conn. at section 321.

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⁴ Excelsior Mutual Aid v. Riddle,

² Benefit Society v. Fietsam, 97 Ill. 91 Ind. 84; see State v. Turnpike Co., 474. 16 Ohio St. 308; State v. Railroad Co.,

³ People ex rel. v. Dulaney et al., 96 43 N. J. Law 505; State v. Bridge Co., Ill. 503; County of St. Clair v. The 20 Kan. 404; State v. Trustees of

propriety of *mandamus* as a remedy in a case of contract between parties and a breach thereof, the court said: "Such a writ does not purport to adjudge or decide any right. It is rather in the nature of an award of execution than of judgment. It is the mode of compelling the performance of acknowledged duty or enforcing an existing right rather than deciding what that right or duty is. The award is no finality. It concludes nothing. If the writ is denied, the relator can not have error, and if granted, the award could not be pleaded in law. If the writ were issued in this case, it could not direct the payment of any specific amount, as that is dependent upon the number of certificates in force at a given time, which must first be ascertained, so that a question might arise whether it would not be necessary to issue several in order to give the party adequate relief. But why should this be done while the defendant company denies all and any liability because of fraud or false representations? Here is a question that should first be settled, and manifestly an ordinary trial in a court of law is the proper way of so doing. The argument that the company has no funds to pay a judgment, if one is recovered, can be no reason for issuing the writ. If it were, this court might be under the necessity of issuing it in the case of insolvent debtors generally. Indeed, it may be said that a private corporation can not by the peculiar form of contract it enters into with individuals, nor because of its insolvency, or both, avoid an action at law upon a breach of its agreement, or confer original jurisdiction upon this court for the collection of money demands."¹

Where the by-laws of a mutual benefit association provide that its members shall be subject to but one assessment for each death loss, and one assessment is made from which only part of the amount due on a certificate is paid, *mandamus* will not lie to compel the levy of another assessment in order to pay a judgment obtained for the remainder found to be due, and it is immaterial in that regard whether the first assessment was sufficient to pay the claim in full or not.² In a suit upon a

Salem Church, 114 Ind. 389; 16 N. ² People *ex rel.* Meyers v. Ass'n, 126 East. Rep. 808. N. Y. 615; 27 N. East. Rep. 1037, re-

¹ Burland v. Association, 47 Mich. versing 12 N. Y. Supp. 171.

427; Bates v. Association, 47 Mich.

fire insurance policy issued by a mutual insurance company, which, in substance, provided that the loss as adjusted should be paid by assessments upon its members, it was held, that, as the society had adjusted plaintiff's loss, and had neglected to make the necessary assessment within the time stipulated in the contract, plaintiff was entitled, under sections 3375 and 3381 of the Code of Iowa, to an order of *mandamus* to compel the levy of such assessment.¹

§ 331. **Remedy in equity.**—It has been held that courts of equity have jurisdiction to enforce specific performance of those contracts of insurance which provide, in substance, that, upon the death of a member who has complied with all the requirements of the contract upon his part to be performed, the society will levy an assessment upon its members, and collect and pay over to the beneficiary the proceeds thereof. The grounds of such equitable jurisdiction are not discussed at length in any of the cases holding this doctrine, though the relation of trustees and *cestuis que trustent* is, in a measure, assumed, and the inadequacy of the legal remedy seems to be the foundation of the decisions. Ordinary mutual life insurance companies are not, in any sense, trustees in their relations to their policy holders.² It has, however, been held that a mutual benefit society stands as a trustee of the fund which it collects for the beneficiary entitled thereto.³ Whether relations of trust exist between the society and its officers or between the society and its members need not here be inquired into, but it would certainly be difficult to define any general fiduciary relation between the society and a beneficiary of one of its contracts of insurance. When we consider that the contract is unilateral, binding upon the society in case the member desires to continue the contract, but not enforceable against a member refusing or neglecting to pay; that so many courts have held the legal remedy to be practicable and adequate; that assumed fiduciary relations between the parties are illusive, intangible and

¹ Harl v. Ins. Co., 74 Iowa 39; 36 N. W. Rep. 880; see Rainsbarger v. Association, 72 Iowa 191.

² Taylor v. Charter Oak, 9 Daly 489; Bewley v. Equitable Society, 61 How. Pr. 344; Cohen v. N. Y. Mutual, 50 N. Y. 610.

³ Relief Association v. McAuley, 2 Mackey, D. C. 70; Covenant Mutual Benefit Association v. Sears, 114 Ill.

108; *In re* Protection Life Ins. Co., 9 Bissell 188; Wilber v. Torgerson, 24 Ill. App. 119; see § 121 *et seq.*

incapable of satisfactory definition, we may be in doubt as to equitable jurisdiction in such cases. Nevertheless, because of the peculiar provisions of the contract of insurance, and the power of a court of equity to give adequate and direct relief in the enforcement of its provisions, and because of the uncertain and narrow relief by execution on a judgment at law, it is certain that such contracts possess the essential elements and incidents which give to courts of equity the jurisdiction to compel the performance of them.

A society issued to a member a certificate by which it agreed, upon his death, to make an assessment on each member of the society, and to pay the proceeds of such assessment, not exceeding the sum of twenty-five hundred dollars, to his beneficiary. After the death of the member, the beneficiary brought an action at law upon the certificate, but the supreme court Iowa, Beck, J., dissenting, held that, upon the refusal of the defendant to make the assessment and pay over the proceeds of such assessment, an action at law could not be maintained for the recovery of such sum as it might be supposed would have been realized if the assessment had been made; that the remedy of the beneficiary was by a proceeding to compel the society to make the assessment.¹ In another case² decided by the same court three days after the case of *Rainsbarger v. Association*, *supra*, it was held that an action at law was properly brought on such a contract, but that in such an action nominal damages only could be recovered. A bill in chancery was brought to recover the benefit fund agreed to be paid by the terms of a certificate of membership in a society. Objection was taken to the jurisdiction of the court, that there was an adequate remedy at law. The supreme court of Illinois, in passing upon this question, said: "The certificate of membership does not contain any contract to pay to the beneficiaries \$5,000, or any sum, absolutely, but to levy assessments ratably upon all members holding certificates in force at the death of decedent, for an amount not less than the limit of the certificate, and

¹ *Rainsbarger v. Association*, 72 Iowa 191; 33 N. W. Rep. 626; *Bailey v. Association*, 71 Iowa 689; 27 N. W. Rep. 770. ² *Newman v. Association*, 76 Iowa 56; 33 N. W. Rep. 662.

to pay over the sum so collected on such assessments, less the collection costs. As the corporation is not organized for pecuniary profit, has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in by assessment for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy, by directing a specific performance of the contract of the defendant by the levying of the proper assessments."¹

§ 332. **Contract to resort to equity.**—While parties may not, by contract in advance, waive all their remedies for a breach of a contract, yet they may waive some of them, and may stipulate in advance which remedies only may be pursued in case of its breach. The only limitation upon this abridgment of remedies is that the one stipulated to be pursued shall be capable of affording substantial relief. Such a waiver or stipulation must be in express and unequivocal terms. A society issued a certificate of membership in which it agreed that, if the member died in good standing, it would make an assessment upon the surviving members and pay over the proceeds of the assessment, not exceeding \$5,000, to the beneficiaries of the insured. The certificate contained, among other conditions, the following: "The only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made." In an action at law on the policy, the court said: "If the policy provided in clear terms that the beneficiaries shall, in case of death, receive

¹Covenant Mutual v. Sears, 114 East. Rep. 642; N. W. Association v. Ill. 108, distinguished and commented upon in Ring v. Association, 33 Ill. App. 168; Suppiger v. Association, 20 Ill. App. 595; Metropolitan Association v. Windover, 137 Ill. 417; 27 N. East. Rep. 538; see Union Mutual v. Frohard, 134 Ill. 128; 25 N. W. Association v. Wanner, 24 Ill. App. 357; Burdon v. Association, 147 Mass. 360; O'Brien v. Society, 117 N. Y. 310; 22 N. East. Rep. 954; see also Taylor v. Union, 94 Mo. 35; 6 S. W. Rep. 71; Newman v. Association, *supra*; Britton v. Supreme Council, 46 N. J. Eq. 102.

a particular sum to be recovered by assessment, or to be paid by the company after making an assessment, if the company had refused to make an assessment, I am inclined to the opinion that an action at law might be maintained, especially if there was no provision in the policy itself forbidding it. But since the policy here does not fix upon the company an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular assessment, to be levied in a particular way; and since it further provides that the company shall only be liable in a proceeding to compel it to make the assessment, we are of the opinion that an action at law can not, at least in the first instance, be maintained. However inequitable such a contract may be, it is undoubtedly within the power of the parties to enter into it, and, therefore, we think that the only remedy, according to the practice of this court, and under the terms of the policy, is by a proceeding in chancery to compel a specific performance."¹

§ 333. **An action at law is a proper remedy.**—Though a beneficiary may resort to a court of equity to require the society to levy an assessment, upon its neglect or refusal to do so, he may, if he prefer, bring an action at law for damages for breach of the contract to levy the assessment. Nearly all of the adjudicated questions in mutual benefit insurance have arisen in suits at law. It is true that in many of these cases there is no discussion as to the proper form of action or the proper forum for the adjudication of the rights of the parties. This may at first impression seem to detract from their force as authorities in favor of the proposition that an action at law is a proper and adequate remedy, but the general acquiescence of the bench and bar in this proposition is certainly a strong argument in favor of its soundness.²

¹ Eggleston v. Association, 18 Fed. Rep. 14; 19 Fed. Rep. 201.

² The following are some of the cases in which it is decided or assumed that an action at law for damages is a proper and adequate remedy for a breach of the agreement to levy an assessment and pay over the proceeds, and in which the questions arising in the record are discussed and decided upon that theory. Cur-

tis v. Mutual Benefit Life Co., 48 Conn. 98; Mutual Endowment Association v. Essender, 59 Md. 463; Yoe v. Masonic Mutual, 63 Md. 86; Bates v. Association, 47 Mich. 646; 17 N. W. Rep. 67; Burland v. Association, 47 Mich. 427; 11 N. W. Rep. 269; Hankinson v. Paige, 31 Fed. Rep. top page 189; S. W. Mutual v. Swenson, 49 Kans. 449.

Where the contract provides that on the death of a member an assessment shall be levied on the surviving members, and the sum collected on such assessments shall be paid to the beneficiary, an action at law will lie for breach of the contract to levy the assessment.¹

Where the contract stipulates that the society shall pay a certain amount as a benefit fund, or such part thereof as may be raised by an assessment levied upon its members, an action at law for breach of the contract to levy the assessment is a proper remedy.²

§ 334. **Pleadings, breach of promise to pay.**—Where the contract of the society is to pay a specific sum of money, it is sufficient to aver, in a complaint or declaration on the contract, a breach of the promise to pay that sum. But where the contract provides that the society shall pay as many dollars, or as many times a specific sum, as there are members of the society in good standing at the time of the death of the member, it is evident that, in addition to an averment of a breach of the contract to pay, there must be an allegation of the

¹ *Covenant Mutual v. Hoffman*, 110 Ill. 603; *Suppiger v. Covenant Mutual*, 20 Ill. App. 595; *New Home Life Ass'n v. Hagler*, 23 Ill. App. 457; *Abe Lincoln Society v. Miller*, 23 Ill. App. 341; *Miller v. Georgia Masonic*, 57 Ga. 221; *Kaw Life Ass'n v. Lemke*, 40 Kan. 142; 19 Pac. Rep. 337; *Earnshaw v. Society*, 68 Md. 465; 12 Atl. Rep. 884; 11 Cent. Rep. 508; *Oriental Ins. Co. v. Glancey*, 70 Md. 101; 16 Atl. Rep. 391; *Taylor v. Relief Union*, 94 Mo. 35; 6 S. W. Rep. 71; *National Ass'n v. Heckman*, 86 Ky. 254; *Jackson v. Association*, 73 Wis. 507; 41 N. W. Rep. 708; *Splawn v. Chew*, 60 Texas 533; *Lenders' Executor v. Ins. Co.*, 12 Fed. Rep. 465; 4 McCrary, 149; *Fairchild v. Association*, 51 Vt. 613; *Darrow v. Society*, 116 N. Y. 537; 22 N. East. Rep. 1093; 42 Hun 245; *Silvers v. Association*, 94 Mich. 39; 53 N. W. Rep. 935; *Bentz v. Association*, 40 Minn. 202; *Herndon v. The Triple Alliance*, 45 Mo. App. 426.

² *Metropolitan Association v. Windover*, 137 Ill. 417; 27 N. East. Rep. 533; *N. W. Ass'n v. Wanner*, 24 Ill. App. 357; *N. W. Ass'n v. Hall*, 118 Ill. 169; *Mandego v. Association*, 64 Iowa 134; *Kansas Protective Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275; *Supreme Council v. Anderson*, 61 Texas 293; *Excelsior Mutual Aid Ass'n v. Riddle*, 91 Ind. 84; *Elkhart Mutual v. Houghton*, 103 Ind. 286; *Peck v. Association*, 52 Hun 255; 5 N. Y. Supp. 215; *Fulmer v. Association*, 12 N. Y. St. Rep. 347; *Freeman v. Society*, 42 Hun 252; *O'Brien v. Society*, 117 N. Y. 310; 22 N. East. Rep. 954; affirming 51 Hun 495; 21 N. Y. St. Rep. 640; 4 N. Y. Supp. 275; *Doty v. Association*, 9 N. Y. Supp. 42; *Fitzgerald v. Association*, 5 N. Y. Supp. 837; *Bentz v. Association*, 40 Minn. 202; 41 N. W. Rep. 1037; *Stewart v. Association*, 64 Miss. 499; 1 Southern Rep. 743; *U. S. Association v. Barry*, 131 U. S. 100; *Lawler v. Murphy*, 58 Conn. 294.

number of such members, in order to give the *data* from which the amount of the liability may be computed. The want of such allegation would, doubtless, be cured after verdict. It is also evident that, where the contract provides merely that the society shall levy an assessment upon its members and pay over the proceeds thereof to the beneficiary, it is not sufficient to aver a breach of the promise to pay. The facts must be alleged which raise the promise to pay, and it is necessary to aver, in a complaint or declaration on such a contract, either that an assessment has been levied and a certain amount collected thereon, which the society refuses to pay, or that the society has neglected or refused to levy an assessment upon its members and to pay to the plaintiff the amount which would have been realized from such an assessment. The want of such an averment is a fatal defect on demurrer, on motion in arrest of judgment, or when the question is raised for the first time in the court to which an appeal has been taken, for there is not only an omission to state any facts to show the ground of the society's liability, but there is also a want of *data* to show the amount of such liability, or from which it may be computed. Where, however, the contract provides that the society shall levy an assessment upon its members and pay to the beneficiary the proceeds thereof, not exceeding a certain sum, there is a division of authority as to whether it is necessary to allege either a neglect to levy such assessment and the amount which would have been realized had it been levied, or that an assessment had been levied and the payment of the proceeds refused. One line of authorities holds that, as the society has set the limit to its liability, and held out the hope that so large an amount may be realized from an assessment, the beneficiary may declare as upon an express promise to pay the maximum amount named in the contract, leaving the society to aver, as a matter of defense, the facts which show the amount of the liability to be, in fact, less than that limit.¹

¹ Supreme Lodge v. Knight, 117 Ind. 489; 20 N. East. Rep. 479; Elk-hart Mutual v. Houghton, 103 Ind. 286; Luders' Ex'r v. Ins. Co., 12 Fed. Rep. 465; 4 McCrary, 149; Kansas Protective Union v. Whitt, 36 Kan. 760; 14 Pac. Rep. 275; see also Union Mutual v. Frohard, 134 Ill. 528; 25 N. East. Rep. 642; Metropolitan Association v. Windover, 137 Ill. 417; 27 N. East. Rep. 538; Suppiger v. Association, 20 Ill. App. 595; Lawler v. Murphy, 58 Conn. 294.

The other line of authorities holds that as the maximum amount is not absolutely promised, but is merely mentioned as the limit of liability, the rule of pleading is not changed by such words of limitation.¹ It has also been held, in another line of cases, that to entitle plaintiff to recover in an action at law for damages, he must allege in his declaration and show on the trial that the society has levied an assessment upon its surviving members to pay the death loss, has collected the amount of such assessment, and has failed to pay the sum so collected; that it must appear both in the declaration and in evidence that the society has in its hands the money collected by assessment, which it ought to pay to plaintiff as beneficiary entitled to it; that if the association has failed to make the required assessment, or, having made the assessment, has neglected to collect the same, plaintiff's remedy is in some other form of action or proceeding.² Where the complaint or declaration alleges that the amount due the plaintiff is a certain sum, the failure to deny such allegation must be taken as an admission that that sum is due on the certificate, unless it is invalid for reasons stated in defense of the action.³ An allegation in a complaint or declaration, that an assessment under the articles of incorporation and by-laws at the time of the death of the member, and for a long time thereafter, far exceeded the sum named in the certificate, refers to an assessment such as the policy calls for, and evidence is admissible to show what an assessment under the contract would have amounted to.⁴

§ 335. **Pleading, evidence, breach of promise to pay.**—

It is evident that, in those courts where it is held that the fixing of a limit to the amount which will be paid as a benefit

¹ *Curtis v. Ins. Co.*, 48 Conn. 98; ² *Smith v. Association*, 24 Fed. Rep. Earnshaw v. Society, 68 Md. 465; 12 685; *Newman v. Association*, 76 Iowa Atl. Rep. 884; 11 Cent. Rep. 508; 56; 33 N. W. Rep. 662; *Tobin v. Society*, 72 Iowa 261; 33 N. W. Rep. 663; *Taylor v. Union*, 94 Mo. 35; 6 S. W. Rep. 71; *New Home Association v. Baily v. Association*, 71 Iowa 689; 27 Hagler, 23 Ill. App. 457; *Deardorff v. N. W. Rep. 770.*

Association, 89 Cal. 599; 27 Pac. Rep. 158; *Jackson v. Association*, 73 Wis. Supp. 42.

507; *Oriental Association v. Glancey*, ⁴ *Martin v. Association*, 16 N. Y. 70 Md. 101; 16 Atl. Rep. 391; *Mutual Association v. Tuggle*, 138 Ill. 428; Supp. 279.

Association v. Tuggle, 138 Ill. 428; 28 N. East. 1066; *Meyers v. Ass'n*, 17 N. Y. Supp. 727.

fund, does not change the rule of pleading, so as to permit the claimant to declare as upon an express promise to pay a specified amount, a certificate of membership, providing that on the death of a member and due proof thereof, an assessment shall be levied upon the members holding certificates, and that the amount collected from such assessment shall be paid to his beneficiaries, not to exceed a certain sum, is not admissible in evidence under a declaration which avers a promise by defendant to pay a specific sum. In so deciding, it was said: "The certificate of membership read in evidence was clearly inadmissible under the declaration, which does not aver that any assessment was made, or the number of members liable to assessment, or the amount that could have been collected by such assessment, or aver any facts showing a duty by defendants to make such assessment, but avers a promise by defendants to pay plaintiffs a specific sum of \$4,000. The certificate read to support this averment is a conditional promise to pay the amount collected of members by assessments, less cost and expense of collection. There is a fatal variance between the averments and the proof offered to sustain them."¹ But where the opposite rule obtains, such a certificate is admissible under an averment of an express promise to pay.²

§ 336. **Averment of a demand for an assessment.**—It is not necessary, in order to lay the foundation for a recovery, that the plaintiff shall make or aver that he has made, a demand upon the society for an assessment upon its members to pay the death loss. The duty to make an assessment is

¹ *New Home Life Association v. Hagler*, 23 Ill. App. 457; *Supreme Council v. Anderson*, 61 Texas 296.

² See § 340 *et seq.* In *Supreme Council v. Anderson*, *supra*, it was held that where a society agreed to pay "a sum not exceeding \$5,000 in accordance with and under the provisions of the laws governing said fund," the liability of the society was *prima facie* the full sum of \$5,000, and that the burden was on the society to set up and show that the plaintiff was entitled to recover a less sum; but it was also held that a certificate agreeing to pay such a sum under and subject to certain conditions was not admissible in evidence under an allegation of the complaint that the society had agreed to pay the full sum of \$5,000; that such a variance was fatal. See *Oriental Ins. Co. v. Glancey*, 70 Md. 101; 16 Atl. Rep. 391; *Curtis v. Mutual Ben. Life Co.*, 48 Conn. 98; *Taylor v. Union*, 94 Mo. 35; *Earnshaw v. Sun Mutual*, 68 Md. 465. But in *Helferman v. Supreme Council*, 40 Mo. App. 606, it was held that the variance was not material, since it could not have misled the society.

imposed upon the society by contract, and if the society fails in this duty, the beneficiary has the right to his proper remedy for such failure.¹ The furnishing of satisfactory proof of the death of the member to the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and, impliedly, a demand upon the society to procure the necessary fund by an assessment if need be.²

§ 337. **Plea setting up that no fund has been raised by assessment.**—In an action of assumpsit on a certificate of membership, the society pleaded that it was provided in its by-laws that the money to be paid on the death of any member should be produced by an assessment of \$2, to be levied upon each of the remaining members of the series of membership to which the decedent belonged, and that no such assessment had been levied or ordered. The court said: "This plea is bad, as it is the duty of the officers of the defendant to order an assessment on the death of a member, and to permit the defendant to set up the failure of duty of its officers, as a reason for defeating the plaintiff's action, would be to allow it to take advantage of its own wrong."³ By a certificate of insurance issued to a member of a society, there was to be paid to the beneficiary, if living, in ninety days after due proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars. The fourth condition thereof provided that "the death claim under this contract shall be payable in ninety days, after satisfactory proof of the death of the said member shall have been furnished," as therein provided. In a suit by the beneficiary, after the death of the member, the society objected to the right of the plaintiff to maintain the action to recover the amount, upon the ground that the promise to pay was contingent, not absolute, as payment was to be made out of a special fund, the death fund, to be procured from an assessment on the members of the society, and that the beneficiary was restricted to the fund thus specified;

¹Smith v. Association, 24 Fed. Rep. 685; Kansas Protective Union v. Whitt, 36 Kans. 760; 14 Pac. Rep. 275; S. W. Mutual v. Swenson, 49 Kans. 449.

²Freeman v. Society, 42 Hun 352.

³Birnbaum v. Passenger Conductors, etc., 15 Weekly Notes of Cases (Pa.) 518; see Hankinson v. Paige, 31 Fed. Rep. 184-188-189.

and, further, that there was no proof of the existence of such a fund. The court said: "It may well be that the beneficiary would be thus restricted, in case of due effort by the society to assess its members liable to assessment therefor. An omission to make an assessment which, if made, would produce a fund equal or greater than the claim, would create an obligation against the society, the same as if it had the fund on hand from which to make payment. It could not lie by, and omit to put into operation the means possessed by it to obtain the fund, and omit payment because of its own neglect of duty. This would be to take advantage of its own wrong, and it would operate as a fraud on the beneficiary under the certificate, since the obligation to raise the fund by assessment, when shown to be adequate for that purpose, would take the place of the fund in determining the question of liability. So, too, the furnishing of satisfactory proof of the death of the member of the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and impliedly would also be a demand upon the company to procure the necessary fund by assessment if need be. It should be further observed that according to the fourth condition upon which the certificate was issued and accepted, payment was to be made absolutely in ninety days after satisfactory proof of the death of the member was duly furnished to the society. So, too, the provision in the body of the certificate, that payment should be made of a sum equal to the amount received from a death assessment, not to exceed the sum specified, in ninety days after due proof of the death of the member was given, implies an obligation upon the company to proceed and make the necessary assessment to raise the fund within the time during which it was provided that the claim should remain in abeyance. For all these reasons, the objection to recovery, on the ground that there was no proof of the existence of a death fund, must be held of no avail."¹

§ 338. **Evidence, effect of the collection of an assessment by society.**—In an action on a certificate of membership, it appeared in evidence that the society had levied an assessment upon its members and realized the benefit fund with which to

¹ Freeman v. National Benefit Society, 4 N. Y. Supp. 215; Law-
society 42 Hun (N. Y.) 252; O'Brien v. Murphy, 58 Conn. 294.

pay plaintiff's claim. The society offered to show the invalidity of the plaintiff's claim by proving the falsity of certain representations made by the member upon procuring the certificate, which representations were made a part of the contract. The evidence was excluded, under the objection of the society, upon the ground that, as the society had acquired the money sought to be recovered, by virtue of assessments levied upon and paid by its members for the purpose of paying the claim, it thereby became the agent of its members for the purpose of paying the money upon the claim, and had no right to contest its validity or withhold the payment of the money. But, on appeal, it was held that the court erred in so excluding the evidence; that it was the right and duty of the society to protect its members and the benefit fund from all invalid claims.¹

§ 339. **Evidence of the amount which might have been realized by assessment.**—In one case² proof was introduced showing *prima facie* that an assessment upon the members liable to contribute to the death fund would have been adequate to the payment of the loss sued for. This proof was the report of the society made to the state insurance department only a few days after the death of the member. The evidence was objected to, as not the best evidence of the facts stated therein; and it was claimed that the books of the society should have been produced. The court said: "The report so made was, however, of equal dignity and certainty with the records of the society. It was made up by the society from its records—indeed, was itself a record required by law to be made by the society, and filed in the insurance department as a record. It was, therefore, competent evidence of the facts therein stated and certified, and the evidence of (a witness) went merely to calculations in elucidation of those facts, in connection with the table of the defendant's assessment rates, which evidence and table, it seems, were received as proof without objection. The report to the insurance department, with the other proof above referred to, made a *prima facie*

¹ Mayer v. Equitable Reserve, 42 Iowa 462; 39 N. W. Rep. 709; see Hun (N. Y.) 237; see also Swett v. § 309.

Citizens Mutual, 78 Me. 541; 7 Atl. ² Freeman v. National Benefit Society, 394; Bock v. A. O. U. W., 75 ety, *supra*.

case against the defendant on the point of its ability with due diligence to raise a death fund sufficient to answer the claim in suit; and no proof whatever was given or offered to gainsay such *prima facie* case. If it might have been the case, as is suggested by the defendant's counsel, that all persons who were members of the society December 31, 1885, when the report to the insurance department was made, were not also members when Darrow (the deceased member) died, but twenty days previously; and that the members named in the report may not have been solvent and able to pay an assessment if one had been made; or, that each and every assessment would have been paid if made, these were matters to be shown by the defendant against what was fairly inferable from the case as made by the plaintiff on the evidence submitted. The report was made during the time within which there should have been an assessment to meet and answer the plaintiff's claim. It was, therefore, to be inferred, in the absence of all proof to the contrary, that it contained the facts constituting a proper and adequate basis therefor."¹

Where each notice of assessment contained a statement of the number of members liable, as for instance—"We have now eleven hundred members and are adding thereto daily"—"We have eleven hundred and eighty-five members," etc., the court held such statements admissible to show the number of members; and, it being shown that such statements were made only a short time before the death of a member, the court held that this evidence had a tendency, at least, to prove that, at his death, there were as many as one thousand members, and was properly submitted to the jury for that purpose.²

Parol evidence is admissible to show the number of members in good standing, in order to ascertain the sum recoverable under the contract.³ The number of certificates of

¹See *Kaw Valley Association v. Lemke*, 40 Kans. 142 and 661; 19 Pac. Rep. 337; *O'Brien v. Society*, 4 N. Y. Supp. 275; 51 Hun 495; 117 N. Y. 310; 22 N. East. Rep. 954; *Cushman v. Society*, 11 N. Y. Supp. 428.

²*Fairchild v. North Eastern Mutual Life Association*, 51 Vt. 613. In this case the certificate provided for an assessment of one dollar on each surviving member to pay the death loss, but also provided that the amount to be paid to the beneficiary should not exceed one thousand dollars.

³*Benefit Society v. Fietsam, Adm'r*, 97 Ill. 474.

membership which have been issued by a society is *prima facie* evidence of the number of members in good standing, and the burden is on the society to show that any persons, to whom certificates of membership have been issued, have ceased to be members by forfeiture, suspension or otherwise. It has peculiarly within its possession the means of showing such facts, and to require a plaintiff to prove a negative in case of each person who has been received into membership,—that such person had not been suspended, or had not forfeited his membership—would be unreasonable and impracticable.¹

§ 340. **Burden of proof.**—Where the society covenants to maintain a death fund, to levy assessments whenever the fund shall have become diminished or depleted and to pay therefrom a certain sum of money on the death of the member, it is not incumbent on the plaintiff to show that the fund is sufficient to pay the demand, or that the proceeds of proper assessments will be sufficient.² Where the contract provides that the society shall pay as many times a certain sum of money as there are members at the time of the death of the member insured, or where it merely provides that an assessment shall be levied upon the surviving members and the proceeds thereof paid to the beneficiary, the burden is on the plaintiff to prove by proper evidence the number of members of the association, or the amount which would have been realized from the assessment. Where the contract provides, in substance, that an assessment shall be levied upon the surviving members, and the proceeds thereof, *not exceeding a certain named sum*, shall be paid to the beneficiary, the society is, according to some authorities, *prima facie* bound to pay the maximum amount of its liability as specified in the contract, and the burden is on the society to prove that a less amount would have been realized by an assessment.³

¹ Neskern v. Association, 30 Minn. 406.

² Cushman v. Society, 13 N. Y. Supp. 428; La Manna v. Accident Company, 10 N. Y. Supp. 221; Harl v. Ins. Co., 74 Iowa 39; 36 N. W. Rep. 880; Wadsworth v. Co., 132 N. Y. 540; 29 N. East. Rep. 1104; affirming 9 N. Y. Supp. 711.

³ Supreme Lodge v. Knight, 117 Ind. 489; 20 N. East. Rep. 479; Elkhart Mutual v. Houghton, 103 Ind. 26; 2 N. East. Rep. 763; Lawler v. Murphy, 58 Conn. 294; Silvers v. Association, 94 Mich. 39; Leuders' Exr. v. Ins. Co., 12 Fed. Rep. 465; 4 McCrary, 149; Kansas Protective Union v. Whitt, 36 Kans. 760; 14 Pac. Rep.

In one case the court said:¹ "The certificates each provide that, upon the death of the assured, appellee is entitled to \$1,000, or so much as may be realized from one assessment. The undertaking in each certificate is for \$1,000, unless an assessment will not produce that much. That an assessment would not produce \$2,000 we think is a matter of defense to be set up by appellant. It would be difficult, if not impossible, for appellee to know how many members of the association there are. The books of the association doubtless show the number. These books are in the possession and custody of the officers of the association. If the members are such in number that an assessment would not produce \$2,000, that fact is known to the officers of the association, and they should set it up in an answer, and make good the answer by proof, as they readily could, if true." And in another case it was said:² "Despite some decisions to the contrary, this court can not hold otherwise than that when suit has to be brought, the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced. * * In the absence of any proof to the contrary, the sum recoverable should be against the corporation for the maximum insured. Any other rule would make this insurance scheme a mere delusion and snare." But on the other hand, there are many authorities holding that the fixing of a maximum amount which the society will pay from the proceeds of an assessment does not relieve the plaintiff from the burden of showing the amount which would have been realized from an assessment made pursuant to the contract.³ It has been held that in an action on a certificate of

275; *S. W. Association v. Swenson*, 49 Kans. 449; 30 Pac. Rep. 405; *Elkhart Mutual v. Houghton*, *supra*.

Suppiger v. Association, 20 Ill. App. 595; *Union Mutual v. Frohard*, 134 Ill. 228; 25 N. East. Rep. 642; *Metropolitan Association v. Windover*, 137 Ill. 417; 27 N. East. Rep. 538; *Covenant Mutual v. Hoffman*, 110 Ill. 603; *Supreme Council v. Anderson*, 61 Texas 296; *Bentz v. Association*, 40 Minn. 202; 41 N. W. Rep. 1037; *Jackson v. Association*, 78 Wis. 463; 41 N. W. Rep. 708; see § 335.

² *Leuders' Ex'r v. Ins. Co.*, *supra*.
³ *Earnshaw v. Sun Mutual*, 68 Md. 465; 12 Atl. Rep. 884; 11 Cent. Rep. 508; *Curtis v. Ins. Co.*, 48 Conn. 98; *Fairchild v. Association*, 51 Vt. 613; *Ball v. Association*, 64 N. H. 291; 9 Atl. Rep. 103; *Deardorff v. Association*, 89 Cal. 599; 27 Pac. Rep. 158.

life insurance issued by a mutual benefit society, by the terms of which the plaintiff is entitled to the amount of one assessment, not exceeding five thousand dollars, he can recover nominal damages only in the absence of evidence of the amount of one assessment.¹

§ 341. **Nominal damages in an action at law.**—When the contract provides, in substance, that, upon the death of a member in good standing, an assessment shall be levied upon the surviving members and the proceeds thereof paid over to the beneficiary, there is a conflict of authority upon the question as to the proper measure of damages in an action at law for a breach of the agreement to levy the assessment and pay the money. Some authorities hold that in such an action nominal damages only are recoverable.² A certificate provided that "an assessment shall be levied upon all the members holding certificates in force at the time of the death of said members, for the full amount named in their respective certificates, and the sum so collected on such assessments * * the association agrees to pay and cause to be paid to * * , but in no case shall the payment under this certificate exceed \$5,000." The court said: "The theory of the plaintiff is that if the certificate has not been forfeited, and the defendant disclaims all liability to pay the claim, and refuses to make the assessment, it thereby becomes liable to pay the maximum sum named in this certificate, provided its membership was large enough to have produced such sum, if an assessment had been made, and all the members had paid their assessments. But in our opinion the plaintiff's position can not be sustained. The extent of the defendant's obligation is fixed by the certificate of membership. The association does not agree to pay any sum from any general fund, nor does it provide any general fund. It merely

¹ Ball v. Association, *supra*; Fairchild v. Association, *supra*; O'Brien v. Society, 46 Hun 426; O'Brien v. Society, 4 N. Y. Supp. 275; 51 Hun 495; 117 N. Y. 310; 22 N. East. Rep. 954; Martin v. Association, 9 N. Y. Supp. 16; Cram v. Association, 11 N. Y. Supp. 462.

² Newman v. Association, 76 Iowa 56; 33 N. W. Rep. 662; Tobin v. So-

ciety, 72 Iowa 261; 33 N. W. Rep. 663; Smith v. Association, 24 Fed. Rep. 685; see Garretson v. Equitable Mutual, 74 Iowa 419; 38 N. W. Rep. 127, where verdict for full amount limited in the certificate was permitted to stand because no question of error in assessment of damages was raised in the record.

agrees to levy an assessment and pay over such sum as may be collected upon it. If the company, doubting or denying its liability in a given case, refused to levy an assessment, the contract is not thereby changed, and the company's liability extended. It may be conceded that a wrongful refusal to make an assessment would be a breach of the contract. But we are unable to see how more than nominal damages could be recovered for such breach. No evidence was introduced in this case, and none could have been, showing how many members would have paid their assessment, and how many would have chosen to refuse to make payment, and suffer the only consequence of such refusal, namely, a forfeiture of their memberships, nor can either party invoke any presumptions as to how many would have paid, and how many would have refused payment. As to the wisdom or propriety of this form of insurance, or the difficulties in the way of realizing the benefit under the certificates issued, the courts have no responsibility. It is for them to enforce the contracts, according to their terms, which the parties have made for themselves."¹ In *Smith v. Association*, *supra*, the contract of insurance, in substance provided that on the death of a member an assessment should be levied upon all the members, and the sum so collected on such assessments the society agreed well and truly to pay to the beneficiary, but in no case should the payment exceed the sum of twenty-five hundred dollars. In discussing the measure of damages in a suit at law upon the certificate, Dyer, J., in an opinion concurred in by Justice Harlan, said: "Conceding that the heirs of the decedent are the legal beneficiaries entitled to the benefits conferred by the certificate, what are the rights of the parties respecting a recovery upon the certificate on failure of the association to pay the death loss? The theory upon which this suit is brought is that, as in the case of an ordinary life policy of insurance, the plaintiffs are entitled to recover the full sum named in the certificate without regard to the levy of any assessment upon certificate holders, or the collection by the association of any amount so levied. After deliberate consideration of the question, we are of opinion that this is an erroneous view of the relation and rights of the parties under the certificate. The association covenants

¹ *Newman v. Association*, *supra*.

in its agreement, not absolutely to pay the sum of \$2,500, but to levy an assessment upon all members holding certificates at the time of the death of the deceased member, and to pay the sum so collected on such assessment as a benefit to the designated beneficiaries, such payment in no case to exceed the sum of \$2,500. Thus it is apparent that the obligation of the association is only to pay whatever amount is collected from other certificate-holders, not exceeding the sum named. Suppose that no assessment whatever is made, or suppose, an assessment being made, nothing is collected, is the association liable absolutely for the sum named in the certificate in an action like the present? If not, what is the remedy for failure to levy an assessment, or for failure to collect the amount of an assessment actually made, but not responded to by the holders of certificates? If it appeared that an assessment had been levied, and the amount thereof had been collected, but its payment to the beneficiary refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's rights to recover in a money action the sum so collected, not exceeding \$2,500. But this state of the case is not alleged. And, indeed, it was admitted on the argument that no assessment was levied to pay this loss, and, therefore, no sum had been collected for that purpose by the association from certificate-holders. Hence the difficulties above suggested. It seems clear that the right acquired by virtue of the certificate held by the decedent was to an assessment upon all members holding certificates, and the payment of the amount collected on such assessment within a prescribed period of time, the assessment not to exceed the limit of the particular certificate. We were at first disposed to think that it was incumbent upon the plaintiffs, in any view of the case, to make a demand for an assessment in order to lay the foundation of a recovery. But we are now convinced that the duty to make an assessment was imposed by the contract, and if the association failed in this duty, the beneficiaries had the right, by appropriate proceedings to compel the performance of it. Undoubtedly, a court in such a proceeding could enforce the discharge of that duty by compulsory measures against the officers and managers of the association, or, perhaps, through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate-holders assessed.

It is quite clear that every certificate-holder agreed to look for payment to the specific mode set out in the certificate; that is, by assessments and collections within a certain limit as to the amount to be assessed. The holders of certificates are co-members of the association, who have, in effect, agreed to insure each other, and have stipulated as to the mode in which their liability to the heirs or devisees of a deceased member may be ascertained and enforced. But this plan would be defeated altogether if such heirs or devisees could obtain a judgment against the association for the amount limited in the certificate, without regard to any assessment or any amount collected on an assessment, and enforce payment in the ordinary mode in which judgments for money are enforced. To this it may be replied that the association is liable to suit for breach of covenant if it fails to make the required assessment. This may be so. But, if so, what would be the measure of damages? To say that the measure of damages would be the amount of the certificate, with the interest from date when it should have been paid, and to give judgment therefor against the association, would be to ignore the fact that the parties have provided a special mode for the payment of the sum named in the certificate, viz., an assessment against and collection from the living members. The ordinary life policy rests upon the promise of the company to pay the sum therein named. A policy-holder in such a company is under no obligation to pay anything for the benefit of the holders of other policies. Here the insured pays seven dollars to insure a member and agrees to meet mortuary assessments from time to time, as set out in the conditions of the certificate. The association does not contract absolutely itself to pay the sum named in any certificate, but, as we have seen, only that it will assess the living members, and pay over within a certain time the sum collected on such assessment. * * To maintain this action it must appear that the association has in its hands the money collected by assessment, which it ought to pay to the plaintiffs as the beneficiaries entitled to the same."

§ 342. **Substantial damages in an action at law.**—The opinions of the supreme court of Iowa, Justice Harlan and Judge Dyer, are of great weight in determining such questions, and they have certainly covered the ground thoroughly in the

presentation of the arguments in favor of the position assumed by them in these decisions. When the language of these opinions has been quoted, all has been said which can be said from that standpoint. But there is another line of decisions holding that substantial damages may be recovered on such a contract in an action at law. As has frequently been said of contracts of insurance upon the assessment plan, the scheme is a peculiar one. While courts can not refuse to construe and enforce peculiar contracts, it is their duty to construe them in such a way that a society may not, because of the peculiar form and terms of its contract with individuals, avoid an action at law for the breach of its agreement, and such a construction of the contract as will deprive the beneficiary of his right to damages at law for a breach thereof is to be avoided, unless that right is waived in express terms.¹ The contract of insurance is prepared by the society in advance, and in the construction of its provisions the member and his beneficiary have no hand whatever. According to a familiar maxim of the law, the provisions of this contract are to be construed most strongly against the society. It is safe to presume that some available and substantial measure of indemnity for the breach of the agreements made by the society was contemplated by the parties, and it is right and just to presume that they have left the law to apply its usual remedies, where the society has, in the contract, placed no limitation upon the remedy to be pursued by the beneficiary. All the authorities agree that the contract has been broken, when the society wrongfully neglects or refuses to levy an assessment, and the question under discussion is, as to whether such wrongful neglect or refusal shall be held to be a technical or a substantial breach of that contract, or, to speak more exactly, whether for such a breach of contract substantial or merely nominal damages may be recovered. To hold that such neglect or refusal is a technical breach of the contract for which nominal damages only can be recovered at law, and to lay down the rule as stated in the cases above quoted, namely, that the beneficiary can sue at law only for the proceeds of an assessment, and not for damages for failure to collect the proceeds in the manner provided

¹ *Burland v. Association*, 47 Mich. 424; *Hankinson v. Page*, 31 Fed. Rep. 184.

for, gives to the parties an anomalous standing in court. For it places the parties to the contract in an anomalous and peculiar position, when the society is permitted in a court of law to say that nothing but nominal damages is due to the plaintiff, because of its own default in not doing what it has agreed to do; when the society is permitted, as in *Newman v. Covenant Mutual*, *supra*, to set up in bar of the action, as to all but nominal damages, its own default in not making and collecting an assessment, and paying the proceeds to the beneficiary.

As sustaining the necessity of this position, it is not sufficient to say that the contract shows upon its face that the society has no funds with which to pay a judgment, or a claim against it for a death loss, except from the proceeds of assessments. Courts have nothing to do with the physical impossibility of collecting money on executions on their judgments; and if they had, insolvent debtors would be active in setting up their insolvency in resisting claims against them. If the contract is to be scrutinized upon this principle, and the adequacy of the remedy looked to, it might be answered that a court of equity might find it difficult to enforce a decree against a foreign corporation, requiring it to levy an assessment; that such a court might find it exceedingly difficult to collect anything in the manner suggested by Judge Dyer in *Smith v. Covenant Mutual*, *supra*, namely, "through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate holders assessed," or to enforce a forfeiture of membership in the society for non-payment of such an assessment. Nor can the necessity of such a position be sustained upon the theory that, while the damages at law are so uncertain and speculative as to be beyond the possibility of legal measurement, equity furnishes a direct and adequate remedy. The suggestion that equity can enforce the specific performance of such a contract presents to our minds, at first impression, an easy solution of many perplexing questions, but an inquiry into the matter develops quite as much uncertainty, and quite as many difficulties as can possibly arise in the measurement of damages at law. The membership in a mutual benefit society is constantly changing. On the one hand, new members are constantly coming into the society,

while on the other, members die from time to time, and others forfeit their membership. Suppose that a beneficiary should file his bill in equity for specific performance of the contract to levy and collect the assessment, and at the end of six months, or what is far more likely, a year and six months, at the hearing of the cause, the chancellor should find that the beneficiary is entitled to the benefit fund, and that an assessment ought to have been levied upon the surviving members,—say within three months after the death of the assured; what decree shall the chancellor enter? Shall he order an assessment upon all members in good standing at the date of such decree? Such an assessment might not be binding upon members who had entered since the death of the assured, for the by-laws of such societies usually provide, and the plan of mutual benefit insurance contemplates, that a member shall not be subject to an assessment for losses and expenses incurred prior to the date of his admission. The levy of an assessment for losses and expenses incurred prior to the admission of a member is invalid as to the new member, and non-payment of such an assessment will not work a forfeiture of his policy.¹

But assuming, for the further investigation of this question, that under the insurance contract in the particular instance, the society may lawfully assess new members for deaths occurring prior to their admission into the society, will such a decree be just to the parties? If between the time when the society should have levied the assessment, and the time when the decree of the court is executed, the membership liable to assessment has decreased by five hundred members, the court is not rendering to the beneficiary the full measure of his right. And if during that time the membership of the society has increased in the number of five hundred members, the decree will give to the beneficiary a larger benefit than he is entitled to, and will operate unjustly and oppressively to the society. Shall the chancellor enter an order requiring the society to assess only those members who were in good standing at the date when the assessment should have been levied? If so, what account is to be taken of those members who have

¹ *Roswell v. Union*, 13 Fed. Rep. J. L. 33; *Farmers' Mutual v. Chase*, 840; *Ins. Co. v. Houghton*, 6 Gray 77; 56 N. H. 341. *Columbia Ins. Co. v. Kenyon*, 37 N.

since that time died, or forfeited their membership? If the innocent beneficiary is not to suffer this loss, an adjustment must be made upon the same principles by which courts of law measure the damages for a breach of the contract to levy the assessment. What decree, then, shall the chancellor enter, which will demonstrate the alleged peculiar and adequate remedy which may be administered by a court of equity?¹

No case can better illustrate the inefficiency of the remedy in equity against a foreign corporation than *Newman, Trustee, v. Covenant Mutual, etc., supra*. After the judgment of the lower court in the action at law was reversed on the ground that in such an action no more than nominal damages could be recovered, and after the cause was remanded to that court, the plaintiff amended the prayer of his petition and demanded that the society proceed to make an assessment upon its members, collect the money and pay off the certificate. A hearing was had, and a decree was entered, ordering an assessment to be made. The remainder of the proceedings and the judgment may be stated in the language of the supreme court of Iowa: "The defendant refused to make the assessment ordered by the decree of the court. This decree was entered January 5, 1888, and the defendant was ordered to make return of its doings in that behalf by the first day of the next term to which the cause was continued. On the 5th day of April, 1888, it being the March term of said court, a supplemental petition was filed, in which the decree of the former term was recited, and it was therein alleged that the defendant had disregarded and defied said decree by neglecting and refusing to make any assessment whatever, and that by reason thereof the plaintiff was unable to realize anything upon said certificate, and that defendant has a large amount of assets and property, and praying for a judgment for the amount of the certificate, with interest from the time an assessment should have been made before the suit was first instituted. A demurrer to this supplemental petition was overruled. The defendant stood on its demurrer, and the court, upon the record before it, and without the introduction of further

¹ See decrees in *Lindsey v. Society*, *Newman v. Association*, 76 Iowa 56; 84 Iowa 734; 50 N. W. Rep. 29; 40 N. W. Rep. 87.

evidence, entered judgment as prayed in the supplemental petition. It is claimed that this judgment is erroneous, and that the only power possessed by the court was to punish the officers of the company for contempt in disobeying the order to make the assessment. We think the judgment was not erroneous. It may be that the officers of this association honestly believed when proofs of loss were made that the association was not liable, or, rather, was under no legal obligation to make an assessment to pay the loss. The record shows that they were in error in refusing to provide for the payment of the loss. They postponed it for nearly six years. It is well understood that the membership of these assessment associations are constantly changing; that new members are not assessable for losses which occur before they become members; and that assessments can be made only on the members liable to pay when the losses occur. It appears from the answer of the defendant that when this loss was payable there were at least 5,000 members liable to assessment in the sum of one dollar each for the payment of this death claim. No court, so far as we have observed, has determined just what is the liability of one of these assessment companies. This court, and most of the other courts of the country, have held that an action at law to recover the amount of the policy will not lie.¹ The defendant's position is that, if the officers refuse to make an assessment, the remedy is punishment for contempt, which is a fine of \$50. This is a safe refuge, and, if adopted by the courts, it discharges the corporation from all liability, and for that matter the court in this case would have been powerless to punish the officers for contempt. They are beyond the jurisdiction of the court in the state of Illinois. Some one should answer for any shrinkage in an assessment now to be made on account of the delay. The party should suffer for it who is in the wrong, and the defendant is obviously that party. It should make good to the plaintiff what he has lost by its breach of its contract to make an assessment, collect the money, and pay it to the plaintiff. To require less upon the record made in this case would be a license to natural persons to organize corporations as a cover

¹ (The court is evidently mistaken in this assertion; see § 333 and cases cited).

to the grossest frauds. Something is said in argument to the effect that the court had no jurisdiction to enter the decree because the defendant is an Illinois corporation. The proposition is not sound. The defendant was properly brought into court, the decree was a personal decree, and the judgment is a personal judgment. It can not be enforced by execution by the courts of this state, but, being a personal judgment against the corporation defendant, it will be entitled to full force and credit in the courts of Illinois."¹

The truth is, the more we analyze this plan of insurance, and inquire into the remedial rights of the parties to the contract, the greater and more numerous seem to be the legal difficulties which present themselves. It may be that it is impossible to give to these contracts a logical and harmonious construction. Any rule which a court may lay down as to the remedial rights of the parties seems to do violence to some provision of the contract. Under these circumstances, courts have generally brushed away, as far as possible, those peculiarities, anomalies and inconsistencies which relate to matters of detail, and have attempted to effectuate the general purposes of the societies by the application of general principles of law. A reasonable construction of the above contract between the society and the member is that the beneficiary shall look to the assessment made and collected by the society, for the payment of the death loss;² and an answer or plea by the society, admitting its liability, setting up the levy of an assessment, notice thereof to its members as required by the contract, and alleging that no money had been received by means thereof, within the time stipulated for the payment of such assessments, would certainly state a good defense to the action. But where the society denies all liability on the contract and refuses to make an assessment and pay the benefit fund, the law will give to the beneficiary his ordinary remedy for breach of a contract, and hold the society to respond in damages in such an amount as might have been collected by making the assessment. It ought not to be a

¹ Newman v. Covenant Mutual, 76 39 N. W. Rep. 312; Hesinger v. Association, 41 Minn. 516; 43 N. W. Rep. Iowa 56; 40 N. W. Rep. 87. see Lindsey v. Society, 84 Iowa 734. 481.

² Kerr v. Association, 39 Minn. 174;

matter of great difficulty to show with reasonable certainty what could have been realized upon an assessment at any given time. Members die from time to time, and assessments are made every few weeks. Some contracts provide that they shall not be levied more than once in each calendar month. Even where the contracts provide that, after proof of death of a member in good standing, an assessment shall be levied without delay, the officers of the society may exercise their discretion about waiting a reasonable time before making the assessment for the payment of the death loss.¹ Very frequently the levy is postponed for a few days, in order that notice of assessments for two or more death losses may be given at one time. It will be an easy matter to show what was realized upon an assessment made at a time when the assessment upon the particular certificate of membership sued on might have been made. And where, by custom, or the contract of insurance, the assessments are made in one month for all death losses, of which proof has been made in the preceding month, the amount may often be reduced to a certainty. It is practically impossible for litigation to arise on such a contract of insurance, unless the society denies its liability, and refuses to make an assessment. When the society contests the claim, it certainly can not complain that the ordinary legal remedy is unjust or unreasonable.

§ 343. **Burden of proof and measure of damages discussed.**—Courts of law have in many cases taken notice of the fact that ordinary insurance companies “send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents,” that “they pay these agents large commissions on the premiums thus obtained,” etc. And, from these facts, these courts lay down certain doctrines, and among them, that the powers of an insurance agent are *prima facie*, co-extensive with the business intrusted to his care.² Courts may with equal propriety refuse to shut their eyes to the fact that mutual benefit societies send men all over the land to establish subordinate

¹People's Ins. Co. v. Allen, 10 Gray (Mass.) 297.

²Union Mutual v. Wilkinson, 13 Wall. 222.

lodges, furnishing them with printed arguments in favor of assessment insurance, as against ordinary "straight line" insurance—wherein these societies hold out to their members, and all persons solicited, the hope and expectation that they may pay the maximum sum limited in the certificate; and from these facts courts may reasonably and justly hold that *prima facie* they are liable for the maximum amount named in their policies, and must assume the burden of alleging and proving that an assessment would have realized a less amount. The society has set the maximum sum which it will pay in any event; it has within its possession the records which show the number of members in good standing, and from which it can know with reasonable certainty how much can be realized from an assessment, and this rule can not operate harshly or oppressively. In *Newman v. Covenant Mutual*, *supra*, stress is laid upon the fact that no evidence could possibly be introduced showing how many members would have paid the assessment on the certificate, and how many would have refused to do so, and the court says: "Nor can either party invoke any presumptions as to how many would have paid, and how many would have refused payment." If these insurance societies carry on business with proper method and attention to details, a society should be able to show by proper evidence, and with reasonable accuracy, the proportion of those who forfeit their membership by non-payment of an assessment, as compared with those who pay an assessment. From the fact that the contract is unilateral—payment of an assessment not being enforceable—it must not be assumed that a great number of members forfeit their membership at the levy of an assessment. Men enter these societies for insurance upon their lives to secure at their death a fund for the benefit of their wives, children and other dependents, and it is reasonable to suppose that they will use every endeavor to pay an assessment, when non-payment forfeits the right of their beneficiaries to such fund. The history and growth of mutual benefit societies are a refutation of the idea that the levy of an assessment causes a great number of members to forfeit their membership.

There are strong reasons why a beneficiary may invoke presumptions as to how many members will pay and how many will refuse payment. When a man becomes a member of a

society, and enters into a contract of insurance for the benefit, after his death, of those who are dependent upon him, he does so upon the faith that the society has the ability to carry out its part of the contract. The society has presented itself to the world as an insurance organization. In the printed matter which it carefully circulates, it reminds the reader of his duty to provide for those dependent upon him by insurance upon his life, and recommends the scheme adopted by it, as the best method by which men may accomplish that object. When a loss has occurred upon its contract, a society should not be heard to argue that its means of raising the benefit fund are so speculative and uncertain that the damages for a failure to collect the proceeds of an assessment can not be measured. But it is just to presume, in favor of the beneficiary and against the society, that every member will pay his assessment on the certificate, and to require the society to show by satisfactory evidence the number of those who would not have paid. The society has it in its power to demonstrate to a mathematical certainty the result of an assessment on the certificate. When a claim is made against the society on one of its contracts recognizing him as a member in good standing, the presumption is that the assured died in good standing, and the burden is on the society to allege and show the fact that he did not so die. It can, therefore, levy an assessment upon its members which they must pay within the stipulated time after notice, on penalty of forfeiture of their claims upon the society. The proceeds of this assessment may be held, pending the investigation or litigation of the claim, and if the claim is defeated, may be used in the payment of other losses. While a society might probably levy an assessment under such circumstances and conditions as would estop it from denying the validity of a claim, yet the mere levy of an assessment for a death loss, unaccompanied by any act recognizing the validity of a contract of insurance, is not a waiver of a forfeiture; and the fact that after the death of a member, the other members paid in their voluntary assessments to meet the amount of insurance, gives the beneficiary no additional rights.¹ As said by Judge Dyer in *Smith v. Covenant Mutual*, *supra*, "if

¹ *Swett v. Citizens Mutual*, 78 Me. 541; 17 Atl. Rep. 394; *Mayer v. Equitable Reserve*, 42 Hun (N. Y.) 237.

it appeared that an assessment had been levied, and the amount thereof had been collected, but its payment to the beneficiaries refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's right to recover in a money action, the sum so collected, not exceeding \$2,500." As the levy of an assessment does not of itself estop the society from setting up "other grounds of defense;" as the society can, by complying with its own agreement to levy an assessment upon its members measure accurately the damages which the plaintiff is entitled to recover, in case the "other grounds of defense" are not sustained in the suit, why should not the plaintiff "invoke any presumptions as to how many would have paid, and how many would have refused payment?"

Where it appears that the society might by the levy of an assessment have paid a benefit fund in full, but that it wrongfully refused to make the assessment until it was doubtful whether enough could be realized thereby, a court of equity may decree that an assessment be levied and the proceeds be paid to the beneficiary, and that the society pay any deficiency which may arise from the assessment.¹

§ 344. **Measure of damages in certain cases.**—A mutual benefit society issued a certificate of membership, agreeing, upon the death of a member, to levy an assessment of one dollar on each surviving member, and to pay the proceeds of such assessment to his widow. Afterward in November, 1869, the member disappeared. In June, 1871, the board of directors of the society passed a resolution declaring themselves satisfied of his death, and ordering an assessment, though no regular proof of his death was ever presented as required by the contract. When the order of the board of directors was made, there were six hundred and forty-nine members, but at the time of his disappearance the membership was much larger. The widow and the society could not agree upon the amount which should be paid to her, and, on the trial of an action brought by the widow against the society, the jury, under the charge of the court, found a verdict for the plaintiff for the sum of \$649. On the appeal of the widow, the supreme court of Georgia held that the amount of the verdict was

¹ Union Mutual v. Frohard, 134 Ill. 228.

substantially correct; that the assessment should be made on those who were members of the society at the date of the resolution of the directors, and not on such as were members at the time of the disappearance. In the opinion the court said: "Whether the defendant could have resisted the payment of the plaintiff's claim for want of proper proof of Miller's death, if the foregoing action of its board of directors had not been taken, it is not necessary to decide; but even the action of the board of directors does not fix the time of Miller's death. Inasmuch as the plaintiff relies on this action of the defendant's board of directors to show its liability to her for the death of Miller, the basis of her recovery should have been the number of members belonging to its company, of Miller's class, liable to be assessed at the time the defendant recognized the death of Miller, and ordered the assessment to be made, and not the number of that class, which belonged to its company at the time of the reported disappearance of Miller, in November, 1869, the defendant not being satisfied from the evidence then before it (the same not being such as its by-laws required) that he was dead. The defendant is made liable, not because the death of Miller was proved in accordance with the requirements of its by-laws, but because it recognized his death in June, 1871."¹ A contract to pay as a benefit a sum "not exceeding \$1,000," with no other provisions helping it out, is an agreement to pay one thousand dollars.²

By its contract a society agreed to pay "an amount equal to \$1.50 for each certificate in force at the time such amount shall become due, but not to exceed \$4,000 * * within ninety days after the receipt by the association of due notice and proof of death of (the member); and this association promises to pay the full amount of this certificate at its maturity: provided, there shall be sufficient moneys in the fund from which this certificate shall become payable; and provided, further, that said moneys shall be distributed proportionately in payment of this and any other certificate be-

¹ Miller v. Georgia Masonic, 57 Ga. People, 18 Mich. 84; Senser v. Bower, 221. Presumption of death by reason of absence for seven years; Johnson v. Johnson, 114 Ill. 611; Rex v. Twynning, 2 B. & Al. 336; Yates v. Houston, 3 Texas 449; Dixon v. The
 1 Pa. 450; Hull v. Rawls, 27 Miss. 471; Harris v. Harris, 8 Ill. App. 57.
² Robyn v. Supreme Sitting, 53 Mo. App. 198.

coming due and payable the same quarter; such payment in no case to exceed the amount named in this certificate." In determining the measure of plaintiff's damages in a suit on this certificate the court said: "There is some dispute over the terms of the policy in relation to the extent of the defendant's liability to beneficiaries; but it is obvious, we think, that the obligation is to pay not less than \$1.50 for each certificate in force, nor more than \$4,000 to be paid from the assessment fund. * * An action for the full amount of \$4,000, which would in any case be the limit of liability, could only be maintained upon its being shown that there was that amount in the assessment fund subject to be applied to the claim ratably with others in the same quarter; which fact is not alleged or found. * * The measure of plaintiff's damages is, therefore, the sum of \$1.50 for each certificate in force."¹ A certificate declared that the amount therein mentioned should be payable from the death fund at the time of death, or from any moneys which should be realized to the fund from the next assessment and that "no claim should be otherwise due or payable except from the reserve fund, as hereafter provided." It also provided that if the death fund was insufficient to meet existing claims by death, an assessment should then be made upon every member at the date of the death last assessed for, and 80 per cent. of the net proceeds thereof should go into the death fund. The constitution provided that the death fund should be used only for the payments of death claims; that payment should be made to the beneficiaries, of the amount to which they were entitled, according to the terms of their certificates; that, so long as the mortuary fund was sufficient to pay existing claims, no assessment should be made; and that, whenever a single assessment was insufficient to meet a death claim in full, there should be paid, in full satisfaction of such claim, a sum *pro rata* of the membership and benefits in force at the time of death. The company required each person proposing to become a member to pay what was called the "first assessment." The insured was the first member to die, and the death fund at his death was insufficient to pay the claim, and assessments were made to meet it. It was held that the claim was not satisfied by pay-

¹ Kerr v. Benefit Association, 39 Minn. 174; 39 N. W. Rep. 312.

ing the amount of the death fund on hand, and that the proceeds of the assessment made to meet it should be appropriated to the full satisfaction thereof.¹ A recovery may be limited to the amount in a particular fund, or to the amount which may be brought into it by proper assessments according to the plan of the society.²

A certificate set forth the obligation of the society to pay "the sum of five thousand dollars from the mortuary fund of the society, and not otherwise, except from the reserve fund as hereinafter provided," and provided that all claims on the mortuary fund, arising between stated intervals of assessment, should be paid *pro rata* out of the next succeeding mortuary call, "but not to exceed the face of each certificate." The society was held to be liable only for the *pro rata* part of the mortuary fund, where it appeared that the reserve fund was not available.³ In an action on a death claim for \$3,000, testimony by the secretary of the society that the assessment levied to meet plaintiff's claim produced only \$600, does not preclude a recovery for a larger sum, where the evidence shows that, in circulars and advertisements issued by it and statements made by its officers at or about the time plaintiff's claim matured, it claimed to be prosperous and to have a large membership and reserve fund.⁴

§ 345. **Measure of damages for change of plan of insurance.**—A deceased member of a mutual benefit society held a certificate which stipulated that it should be governed by the laws of the order then in force or thereafter enacted, and the constitution provided that it and the by-laws should be amendable by the supreme lodge. The certificate also stipulated for the payment on his death to his beneficiary of \$2,000, or,

¹ Wadsworth v. Co., 132 N. Y. 540; 228; Elkhart Association v. Houghton, 103 Ind. 286; Kansas Union v. 29 N. East. Rep. 1104; affirming 9 N. Y. Supp. 711. Whitt, 36 Kan. 760; Kansas Union v. Gardner, 41 Kan. 397; Bentz v. Association, 40 Minn. 202; O'Brien v. Society, 46 Hun 426; 4 N. Y. Supp. 275. The beneficiary may be entitled only to the amount of an assessment. See Kentucky Mutual v. Turner, 89 Ky. 666.

² Hesinger v. Association, 41 Minn. 516.

³ Gyllenhammer v. Society, 24 N. Y. Supp. 930; see Wadsworth v. Co., 132 N. Y. 540; 29 N. East. Rep. 1104; La Manna v. Accident Co., 10 N. Y. Supp. 221. As to payment from reserve fund and from assessments, see

⁴ Wabash Union v. James (Ind. App.), 35 N. East. Rep. 919.

if there should be less than two thousand members of the class to which he belonged, then only \$1 for each member. The number of members increased to sixteen thousand, when, by an amendment of the constitution and by-laws, a new class was established with an assessment based on life expectancy, which was less expensive for young men than the old rank, but was more expensive for old men. The younger members of the old class were rapidly transferred, and at the deceased member's death, some three years later, only one hundred and seventy-three members of the old class remained. During his membership of nine years he had paid to the society \$240. The new plan was adopted in good faith, to benefit the society in general. The deceased and his beneficiary, upon learning of the new plan, notified the society that they protested against it. In an action on the certificate, setting up these facts and making the proper allegations as to the death of the member and proof thereof, it was held that the beneficiary could recover only \$173 on the certificate; that the change of plan was within the scope of the powers of the society, and was not a violation of the contract of insurance made with the deceased; that if the acts of the society, in depleting the class to which deceased belonged, were a breach of the contract of insurance, only nominal damages would be recoverable, as the loss occasioned thereby would be so remote and conjectural as not to form the basis of a recovery. Upon this last point the court said: "The result that would have followed had not the system been changed is a mere matter of speculation and conjecture. It can not be said that, if no change had been made, there would have been no reduction in the numbers of the class. If the system originally adopted was not one (and this the facts stated make very probable) that would maintain itself, then the appellee would have been much worse off than she is now. Whether it would have endured can only be conjectured. The damages are both conjectural and remote. There is no connection between the change in the system and the depletion of the class of which Hussey was a member, that can be legally said to be proximate and natural."¹

¹ Supreme Lodge v. Knight, 117 Ind. 489; 20 N. East. Rep. 479.

CHAPTER XXVI.

PAYMENT OF THE BENEFIT FUND.

§ 346. Payment is not a gift.

347, 348. Payment of the benefit fund, rights of parties.

349-351. To whom the money is payable when the contract is for the benefit of a creditor of the member.

352. Payment from reserve fund.

353. Contract to surrender the certificate when the fund is paid by the society.

354. Payment of the fund into court, interpleader by the society.

355. Payment of a less amount than is due, receipt in full.

356. Settlement procured by the fraud of the society.

357. A member may not enjoin payment.

358. Payment procured by fraud.

359. Right to double payment.

360. Interest on the amount of the benefit fund.

361. Proceedings to obtain payment of judgment.

362. Restricting the operation of the judgment against a society.

§ 346. **Payment of the fund to the beneficiary is not a gift.**—The payment by a mutual benefit society of the benefit fund to the beneficiary named in the contract of insurance is not voluntary, and in the nature of a gift. It is the fulfillment of the contract of insurance entered into for a valuable consideration between the member and the society for the benefit of the beneficiary. If, therefore, payment be made by the society to the wrong person, under the mistaken belief that he is the proper beneficiary, when he is not, the society may recover the money back.¹

§ 347. **Payment of the benefit fund, rights of parties.**—It is often difficult to decide whose receipt for the money due on a certificate will discharge the society from further liability, and who is entitled to bring an action against the society

¹ Townsend v. Crowdy, 8 C. B. (N. McGilroy, 4 Gray 518; National Life S.) 98 E. C. L. 477; Kelly v. Solari, 9 Ins. Co. v. Minch, 53 N. Y. 144; Gil-Mees. & W. 54; Dails v. Lloyd, 12 Q. bert v. Moose, 104 Pa. St. 74. B. 64 E. C. L. 531; Appleton Bank v.

when it has refused to pay. Where a person is expressly designated as the beneficiary of the certificate, such designation is conclusive, in the absence of some question of insurable interest, proper change of beneficiaries, or rights of creditors. He may sue for and recover the amount due at the maturity of the contract, and the receipt of such person will, generally speaking, discharge the society from further liability. In such case the legal representative of the member has no claim upon the fund, and can not maintain an action therefor. But where the fund forms a part of the estate of the member and is bequeathed as a part of the estate, under the general term of "all my estate and effects," subject to the payment of his debts, it is not payable to the devisee, but to the administrator of his estate for due administration and distribution.¹ A contract of insurance expressly promised "to pay to E. P., his executors, administrators or assigns, for the sole use and benefit of" his four children named therein, a certain sum of money. After his death the question arose as to whether the money was payable to the administratrix of his estate or directly to his children, and it was held that, as the insurance, although for the sole use and benefit of the children, was payable, not to them, but by the terms of the contract to his own legal representative, the administratrix was alone entitled to the money.² Where the contract is that the benefit fund shall be paid to the representative of the member, rather than to the beneficiaries, such representative is the only proper party to maintain an action for its recovery. When collected, the fund is held by him as trustee under an express trust for such beneficiaries as may be entitled to it. This doctrine is founded on reason as well as authority and is in harmony with the entire line of decisions upon this question. In *Gould v. Emerson*,³ the contract was made payable to the assured, his executors, administrators or assigns, for the benefit of his widow, if any, and his surviving child or children. The court said: "The contract of the insurance company having been made with

¹ *Winterhalter v. Association*, 75 25 N. East. Rep. 716. and cases cited; Cal. 245; 17 Pac. Rep. 1. *Rindge v. Society*, 146 Mass. 286; 15

² *Stowe v. Phinney*, 78 Me. 250; 3 N. East. Rep. 628.

Atl. Rep. 914; 2 N. Eng. Rep. 74; see ³ 99 Mass. 157.

Flynn v. Association, 152 Mass. 288;

the assured, his executors, administrators and assigns, the defendant, as his administrator, might by law collect the amount of the policy." In *Bailey v. New England Ins. Co.*,¹ the assured procured a policy upon his life payable to him, his executors, administrators and assigns for the benefit of his widow. Suit was brought in the name of the beneficiary against the company, and judgment was rendered in favor of the defendants. The court in referring to two previous decisions² makes use of the following language: "The principle upon which these decisions rest is, that in policies of this kind the executor, administrator or assignee, becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It therefore necessarily follows that the *cestuis que trust* can not maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts, and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own names, might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties."³ A contract of insurance was taken out by a husband "for the sole use of his wife," and it was held that the fund was payable to his administrator in trust for the widow.⁴

In *Mass. Mutual v. Robinson*,⁵ the promise of the company was to pay the sum insured to the "assured, his executors, administrators or assigns," for the express benefit of C. M. R., wife of the assured, and their children. The court held that the executrix of the assured was the proper party to bring suit upon the policy. In another case,⁶ however, where the loss was payable to "the assured, his executors, administrators or assigns," for the benefit of his daughter, it was held that the

¹ 114 Mass. 177.

583; *Campbell v. Ins. Co.*, 98 Mass.

² *Burroughs v. Assurance Co.*, 97

381.

Mass. 359; *Gould v. Emerson*, *supra*.

⁴ *Unity Association v. Dugan*, *supra*.

³ See *Mass. Mutual v. Robinson*, 98

pra.

Ill. 324; *Unity Association v. Dugan*,

⁵ 98 Ill. 324.

118 Mass. 221; *Stokell v. Kimball*, 59

N. H. 14; *Cables v. Prescott*, 67 Maine

⁶ *Hogle v. Ins. Co.*, 6 Robertson 567; 4 Abb. N. S. 346.

daughter was the party in interest, and, as such, entitled to maintain the action under a provision of the code of New York, requiring actions to be in the name of the real party in interest.¹ The cases just treated of are unlike those cases where by the terms of the contract, it is expressly promised, that the amount shall be paid, either absolutely or upon the happening of some expressed contingency, to the beneficiaries themselves, instead of to the legal representative of the member. Thus, in *Martin v. Etna Ins. Co.*,² the insurance money was payable to the wife, her executors, administrators or assigns, if she survived her husband, otherwise to their children. She did not survive him, and the court held that by her death the promise inured to the children who alone could avail themselves of the promise.³ A policy was taken out by a man "for the benefit of his wife and children," payable to "the said assured, their executors, administrators or assigns or the guardian of the children under age," and it was held that the benefit fund was the property of his widow and children, and that the administrator could not collect it.⁴ A contract of insurance contemplated that the designation of a beneficiary should be made during the lifetime of the member, but, having made no such designation, he bequeathed the fund to his second wife. After his death, the fund was claimed by his widow, by his children by his first wife, and by his executor. The society admitted its moral obligation to pay the fund to whomsoever the court might direct it to be paid, and the court rendered judgment that the executor of the estate of the member take it, to be distributed as the probate court might direct.⁵ The probate court distributed it according to the will, holding that the second wife was entitled to it as against the testator's children, and on appeal this order was affirmed.⁶

§ 348. If a person, not the proper beneficiary under the contract of insurance, has received money paid to him in the belief that he was the proper beneficiary, the law implies a

¹ See *Price v. Ins. Co.*, 17 Minn. 497; 2 Ins. L. J. 223; *Hillyard v. Ins. Co.*, 35 N. J. L. 415; 2 Ins. L. J. 137.

² 73 Me. 25.

³ See *Knickerbocker Ins. Co. v. Weitz*, 99 Mass. 159.

⁴ *Cragin v. Cragin*, 66 Me. 517.

⁵ *Order of Mutual Companions v. Griest*, 76 Cal. 494; 18 Pac. Rep. 652.

⁶ *In re Griest's Estate*, 76 Cal. 497; 18 Pac. Rep. 654.

promise on his part to pay it over to the rightful owner. The beneficiary may recover from him the amount thus wrongfully received.¹ Where money has been paid without cause or consideration to one who was not entitled in law, honor or good conscience to receive it, the person paying it may recover it back, provided it was paid under a palpable misconception of the law essentially bearing upon and affecting the contract. A mutual benefit society issued a certificate of membership by which it agreed to pay the benefit fund, upon the death of the member, to a person who was not a member of his family. When the certificate was issued, the officers of the society believed that it had the right under its charter to make such a contract, and, after the death of the member, they paid to the beneficiary named in the certificate the amount of the benefit fund, believing that he was entitled to it under the contract. Under the charter, the society had no power to make such a contract, for by its terms the fund was payable to the widow and children of the member taking out a certificate, and it could not be diverted from these charter beneficiaries by any act of the society or the member. Afterward the widow and children of the deceased member brought an action against the society to recover the benefit fund, and the society instituted a proceeding against the person to whom it had paid the fund to recover the amount which it had paid under a mistake of law. The court held that the society might recover the amount which it had paid to such person under a mistake of law, less the amount of all assessments which he had paid upon the certificate, and the amount expended by him in making out proofs of loss, and further held that he was chargeable with interest only from the date of the judgment.²

Where money has been collected upon a contract which had its inception in a scheme of mere speculation upon the life of the person who was the subject of insurance, or where insurance is taken out by a debtor as a security for the benefit of his creditor, the expense of procuring and continuing the contract being borne by the debtor, the authorities justify the conclusion, in either case, that the amount collected, less the

¹ Bolton v. Bolton, 73 Me. 299; Mel-
lows v. Mellows, 61 N. H. 137; Hol-
land v. Taylor, 111 Ind. 121.

² Gibson v. Society, 8 Ky. L. Rep.

debt secured or the sums advanced in obtaining and keeping the contract in force, may be recovered by the personal representatives of the person insured.¹

The payment by the society of the whole amount of the benefit fund to certain persons, under the supposition that they were the heirs at law of the beneficiary and entitled to the fund, is no defense to a claim of one of such heirs, to whom no payment has been made, for his share thereof.² Where the charter expressly provides that the widow and children of a deceased member shall take the benefit fund, they are entitled to it, even though the certificate is made payable to another person, and the charter beneficiaries, as between themselves and the beneficiary named in the certificate, do not waive their right to the fund by consenting that it may be paid to him, unless there is some consideration for the waiver, or something to operate as an estoppel.³

The innocent payment by the society of the benefit fund to the person whom the deceased member in his lifetime designated as his beneficiary and represented to be his wife is a bar to the claim of the widow against the society. A society was formed for "benefiting and aiding the widows and orphans of deceased members" and its by-laws provided that a member might designate his beneficiary, and if no designation were made, then the fund should be paid to the widow, child or children, mother or legal heirs, in the order named. A member, before his death, made the following direction: "The payment allowed to me by the constitution and by-laws of the grand lodge to be made to Fanny Supplee (my wife)." Under this designation, the fund was, after the death of the member, paid to the person named. This person never had, in point of fact, been the wife of the deceased member, who had been during the whole period of his membership, married to another woman. The widow brought suit against the society for the amount of the benefit fund, and it was held that in ab-

¹ Amick v. Butler, 111 Ind. 578; 12 American Life v. Robertshaw, 26 N. East. Rep. 518; 9 West. Rep. 842; Pa. St. 189; Mathews v. Sheehan, 69 Gilbert v. Moose, 104 Pa. St. 74; N. Y. 585; Bruce v. Garden, 5 Ch. Cannack v. Lewis, 15 Wall. 643; App. C. 32.

Page v. Burnstine, 102 U. S. 664; ² Mutual Aid Society v. Miller, 107 Warnock v. Davis, 104 U. S. 775; Pa. St. 162.

Dutton v. Willner, 52 N. Y. 312; ³ Gibson v. Society, *supra*.

sence of notice to the proper officer of the society, or of the subordinate lodge to which the deceased member belonged, that she was the widow, prior to the payment to the beneficiary designated, she was not entitled to recover.¹

Where a society has paid over the benefit fund to the assignee of a certificate on the faith of the assignment, and the original beneficiary seeks to recover the benefit fund on the ground of fraud upon the member by the assignee, before recovery may be had against the society it must be shown that it had notice of the fraud prior to the payment to the assignee.² Where a party insures his life in favor of a person who has no insurable interest in his life, and the society pays the amount to the person stipulated in the contract, the society will not be compelled to pay it again to the heirs of the deceased or to the executrix of the estate, although notified not to pay the beneficiary by the heir and widow of the deceased.³ A member died leaving a will in which he left all his property to his wife and grandchildren. There was a policy of insurance upon his life in favor of Catherine Bernhard, who had no insurable interest in his life. Notice was given by the widow and heirs to the society that they claimed the benefit fund, and that it must not be paid to the beneficiary named in the policy. But, in disregard of such notice, the society paid it to the beneficiary named in the certificate of membership. The court said: "The defendant paid the money according to the terms of its contract, and to the person named in the certificate of membership. The company did not agree to pay the amount of the insurance to the estate of the person, on whose life the risk was taken. * * There was no contract with the widow and heirs, and no right of action or legal capacity existed in them, as such, to collect the money or to forbid its payment to the beneficiary."⁴ In one case it was held, that where a member had changed the designation of his beneficiary in a manner other than that provided for in the laws of the society, and the society had consented to such change, and, after the death of the member, had paid the benefit fund to the

¹ *Supplee v. Knights of Birmingham*, 18 W. N. Cas. 280.

² *N. W. Mutual v. Roth*, 87 Pa. St. 409.

³ *Smith v. Pinch*, 86 Mich. 484; 45 N. W. Rep. 183.

⁴ *Bomberger, Ex'tr, v. Society*. Pa. St. (not reported), 6 Atl. Rep. 41.

beneficiary in whose favor the change had been made, the original beneficiary could not maintain an action for the fund.¹

Though a sale of a certificate to one who has no insurable interest in the life of the assured is void as being against public policy, that, as a matter of contract right, is a question between the society and the purchaser, and, where the society recognizes its validity by issuing a new certificate, in which the purchaser is named as the beneficiary, and upon the death of the member, pays the money due under the certificate to such purchaser, no stranger or volunteer may assail the validity of the payment.²

§ 349. **To whom the money is payable when the contract is for the benefit of a creditor of the member.**—Unless prohibited by the provisions of its charter and by-laws, a creditor may in good faith take insurance on the life of his debtor, by procuring membership for his debtor in a society and either having himself made the beneficiary of the certificate, or having it assigned to him. The amount of such insurance, however, must bear some just proportion to the debt, or to the extent of the obligation assumed by the beneficiary, and the probable contingencies attending the future maintenance of the certificate. The circumstances must be such as not to raise the presumption that the transaction on its face was a mere speculation.³ But in such case, the amount of insurance which may be contracted for is not limited to the amount of such debt or obligation. If it were, the creditor would inevitably be compelled to lose whatever sums he might be required to pay in effecting the insurance and paying assessments. The beneficiary takes the chance of all future contingencies, including the continued solvency of the society; and that a sufficient number of members will continue to pay their assessments to reimburse him for his advances of assessments. Where the creditor insures with his own funds, for an amount in fair proportion to the amount of his debt, he may recover as his just measure of damages the full amount of the contract; and the debtor's representatives have no claim upon him for any

¹ Manning v. A. O. U. W., 86 Ky. 136; 5 S. W. Rep. 385.

² Amick v. Butler, 111 Ind. 578; 12 N. East. Rep. 518; Fox v. Ins. Co.,

³ Stoelker v. Thornton, 88 Ala. 241; 4 Big. L. & A. Ins. Rep. 458; Mowry v. Home Life etc., 9 R. I. 346.

excess over the debt and expense of maintaining the contract.¹ In *Grant v. Kline*,² A, being indebted to B, his brother-in-law, in the sum of \$743.56, insured his life for the benefit of B, in the sum of \$3,000, B paying all assessments. Upon A's death, the society paid the amount of the insurance to B, against whom the administrators of A brought a suit to recover the \$3,000, less the indebtedness and assessments paid. It appeared that A was considered by the society a good risk, and that the transaction between A and B was in perfect good faith. The court held that the disproportion between the actual indebtedness and the sum insured did not, under the circumstances, create a presumption that this was a wagering contract, nor, in the absence of positive proof, that it was intended as a collateral security merely. Where, however, the disproportion between the amount of a contract taken out by a creditor on the life of his debtor and the debt thereby secured is very great, as where the insurance is \$5,000, and the debt \$100, it is the duty of the court to declare the transaction a wager, as a matter of law. A contract of insurance taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of the cost of maintaining the contract, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables.³ A creditor who takes out certificates in mutual benefit societies, amounting to \$6,500, on the life of his debtor, who owes him \$1,000, where the amount to be realized from such certificates depends on the number and persistency of the members can not be said to be acting in bad faith, for, in view of the character of the certificates, and the manner in which such societies bind themselves to pay, it can not be said that the disproportion between the debt and the real amount and value of the contracts of insurance is so great as to warrant a sentence of condemnation against the transaction as being a mere speculation on wager on the life of the debtor; and where such creditor pays all mortuary assessments, and, on the death of the debtor, realizes only \$2,124.82 on the certificate, he is

¹ Bliss on Insurance, §§ 30, 326; ² *Cooper v. Schaeffer*, 117 Pa. St. Amick v. Butler, *supra*. (not reported); 11 Atl. Rep. 548; 9

³ 115 Pa. St. 618; 9 Atl. Rep. 150. Cent. Rep. 601.

entitled to retain the remainder, after deducting the debt, interest and expenses.¹

§ 350. In case the certificate originates in a transaction which the law condemns, or where the debtor, having taken insurance on his own life, at his own expense, merely pledges the certificate as a security for an existing debt, the holder, whether by assignment or otherwise, who receives the entire proceeds, will be regarded as a trustee of the representatives of the insured for the amount received, less the amount of his debt, or the sums advanced on the certificate, with interest.² If the insurance is effected at the expense of the debtor, either with his prior consent, or by his not objecting to charges made against him for assessments paid in maintaining the contract, and it appears to have been intended as a security only, the debtor or his representative is entitled to the surplus after payment of the debt, and, on payment of the debt, the debtor is subrogated to the rights of the creditor and is entitled to the policy.³ A society issued a certificate on the life of a member, payable to his creditor. There was nothing tending to impeach the good faith of the transaction. The member owed his creditor about \$600. He afterward died without having paid any part of his debt, and without having paid any part of the cost of procuring and continuing in force the certificate of membership. The society paid the creditor about \$1,963 in discharge of its liability upon its contract. After deducting the amount of the indebtedness and the sums advanced for the insurance, it was found that there remained

¹ Rittler v. Smith, 70 Md. 261; 16 Atl. Rep. 890. Defendants insured their debtor, a healthy man of 42 years, in the sum of \$3,000, to protect a debt of about \$100. His expectancy of life, according to the Carlisle tables, was 26 years, and the assessments and annual dues during such time would have amounted, together with interest, to \$4,336.31. It was held that this was not a gambling transaction, and that defendants were entitled to the full amount of the policy, though the assured died within a few years. Ulrich v. Reinoehl, 143 Pa. St. 238; 22 Atl. Rep. 862; dis-

tinguishing Cooper v. Shaeffer, *supra*; Shaffer v. Spangler, 144 Pa. St. 223; 22 Atl. Rep. 865.

² Amick v. Butler, *supra*.

³ Bliss on Insurance, § 326; Levy v. Taylor, 66 Texas 652; American Life v. Robertshaw, 26 Pa. St. 189; Mathews v. Sheehan, 69 N. Y. 585; Gilbert v. Moose, 104 Pa. St. 74; Cammack v. Lewis, 15 Wall. 643; Equitable Life v. Hazlewood, 75 Texas 338; 12 S. W. Rep. 621; Schonfield v. Turner, 75 Texas 324; 12 S. W. Rep. 626; Tateum v. Ross, 150 Mass. 440; 23 N. East. Rep. 230.

of the sum received from the society, \$1,259.58. This sum the administrator of the member demanded from the beneficiary of the certificate, and upon his refusal to pay, the administrator brought suit for the amount.

It appeared in evidence that the creditor had agreed to pay the expense of procuring the insurance and keeping it in force, and that he had also agreed that the debtor might at any time pay the debt, reimburse the creditor for such expenses, and thereby entitle himself to an assignment of the certificate. Upon these facts the court said: "The amount thus collected became the property of the beneficiary, unless the parol agreement to turn the policy over to the debtor upon the conditions already stated affected the creditor with an enforceable trust in favor of the personal representative. We can discover no principle upon which a trust can be maintained in the absence of any offer by the debtor in his lifetime to pay the debt and reimburse the creditor for his advances. * * In the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in which neither the debtor nor his representatives ever had any interest, legal or equitable. A distinguishing element in the determination of cases of this character is, whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while, on the other hand, if the creditor pays the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute."¹ Where a creditor charges his debtor upon his books with the amount paid on assessments on a certificate, it is evident that he understands that such sums are to be considered, as between him and the debtor, simply as loans; and where the circumstances under which the creditor was made the beneficiary of the contract show that it was done solely to

¹ *Amick v. Butler*, *supra*; see *Gottlieb v. Cranch*, 4 De G., M. & G. Freme v. Brode, 2 De Gex & J. 582; 440; *Godsal v. Webb*, 2 Keen 100. *Knox v. Turner*, L. R., 5 Ch. App. 515;

give to the creditor a security for the debt then existing, and for such sums as he should have to pay in the way of assessments to keep the obligation alive, he may not, as against the debtor or his representative, retain an excess of money derived from the certificate and secure the payment of subsequently acquired claims against the debtor.¹ In a recent English case it was held that a creditor who had insured the life of his debtor could retain all the sums he had received from the policies, without accounting for them to the representatives of the debtor, unless there was distinct evidence of a contract to the effect that the creditor should take out the insurance, and that the debtor should pay the premiums, in which case only could the policy be said to be held in trust for the debtor.²

§ 351. It was formerly held in England that though the creditor had an insurable interest in the life of his debtor at the time the policy was issued, yet, if his debt was paid in the lifetime of his debtor, and his interest had therefore ceased, he could not recover, because in such case the contract of life insurance, like the insurance of property, was one of indemnity. But it is now the settled rule in that country that a contract of life insurance is not one of indemnity, but is an agreement to pay a certain sum of money upon the death of the person insured, in consideration of certain payments during his life, and hence, if the contract be valid at the time it was entered into, notwithstanding the fact that the interest of the creditor has ceased during the life of his debtor, he may still recover on the policy though the result may be that he will be twice paid for his debt—once by his debtor and again by recovery on the policy.³ Where the creditor takes out insur-

¹ *Levy v. Taylor*, 66 Texas 652; see *Johnson v. Alexander*, 125 Ind. 575; 25 N. East. Rep. 706.

² *Bruce v. Garden*, L. R., 5 Ch. App. 32. In this case an army agent, to whom an officer was largely indebted on account, effected in his own name policies on the life of the officer, and charged the account of the officer with premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected,

but there was no evidence that the account had ever been shown to him, or that he knew his account was charged with the premiums. The amount received from the policies by the creditor was nearly twice as much as the debt due him from his debtor. *Freme v. Brode*, 2 De G. & J. 582; *Brown v. Freeman*, 4 De G. & Sm. 444.

³ *Dalby v. India, etc., Company*, 28 Eng. L. & Eq. 312; 15 C. B. 365.

ance on the life of his debtor entirely independent of the latter, and continues to pay for its maintenance, the partial or full payment of the debt or the discharge of the debtor in bankruptcy, will have no effect upon the creditor's rights under the contract.¹ In *Ferguson v. Massachusetts Mutual*² it was said: "No statute has gone so far as to declare that a life policy, valid in its inception, because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid. Besides, from the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor; he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy. So, too, in the case at hand, if we were to hold that the policy was avoided by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid, after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its promise which it had not kept. It would be the gainer by the accidental circumstance that the debtor had paid what only he justly owed his creditor, or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of their

¹ *Rawls v. American, etc., Ins. Co.*, 438; 6 Atl. Rep. 213; *Phoenix Mutual* 36 Barb. 357; affirmed 27 N. Y. 282; *v. Bailey*, 13 Wall. 616; *May on Insurance*, §§ 115, 116, 117; *Conn. Mutual v. Schaefer*, 94 U. S. 457; *Bliss on Life Insurance*, § 327; *Goodwin v. N. Y. 593*; *Mutual Life v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439; *Smith*, 70 Md. 261; 16 Atl. Rep. 890; *Amick v. Butler*, 111 Ind. 578; 12 N. East. Rep. 518; *Johnson v. Van Epps*, 647; affirming 32 Hun 306, 110 Ill. 562; *Corson's Appeal*, 113 Pa. St. ² 32 Hun 306.

business. * * Both upon principle and authority we should say that the insurer is bound to fulfill its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom."

§ 352. **Payment from reserve fund.**—The board of directors or other officers, charged with the management of the affairs of the society and the payment of death losses, must, of necessity, be permitted to exercise their discretion to a great extent in the payment of death losses out of any reserve fund in the treasury of the society. Where the reserve fund has not exceeded any limit which the law may have placed upon the amount which may be held as a reserve, it must be left to the discretion of such officers, whether they will pay a loss in whole or in part from the reserve fund, or levy an assessment upon the members to pay it. The idea of a reserve fund imports permanency to some extent, and, if losses were required to be paid out of this fund as they occurred, the fund would soon be depleted and destroyed; the very object for which it was created would be defeated. A member can not, therefore, insist that the amount of money held in the reserve fund be applied to the payment of losses before he shall be required to pay his assessment. The officers of the society may use a part or all of the fund to pay death losses, but they can not be compelled to do so. It is in their discretion to hold the reserve fund and lay an assessment to pay the loss. A statute providing that a mutual benefit society "shall have the right to hold, at any one time, as a death fund, belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment," does not require that losses as they occur shall be paid from this fund, but the officers, in their discretion, may lay an assessment to pay such losses.¹

§ 353. **Contract to surrender certificate when fund is paid by the society.**—Though a contract provides for the payment of the fund upon the surrender by the beneficiary of the certificate, still if the society positively refuses to pay because the claim is unjust and invalid, the beneficiary may sue on it and recover without proving that he offered to

¹ *Cressman v. Mass. Mutual*, 143 Mass. 435; 9 N. East. Rep. 753.

surrender it on payment of the fund.¹ A certificate was delivered to the designated beneficiary. After the death of the member, it was decided that the fund could not be paid to the person named, because he was not within the classes of beneficiaries set forth in the charter. The society, to prevent the loss or waste of any part of its funds in litigation in resisting illegal claims, provided in the contract that it should not be required to pay any claim for a death loss until the certificate was surrendered. The designated beneficiary refused to surrender it to the person entitled to the fund under the by-laws. The court decreed that the certificate was void, directed that it be surrendered for cancellation, and that the fund be paid to the proper person.²

§ 354. **Payment of the fund into court, interpleader by the society.**—It has been held in some cases that when the society brings the benefit fund into court, and asks that the court determine the rights of certain claimants of the fund and discharge it, it does not thereby confess or deny the right of any one of the claimants; that the payment of the money into court for the benefit of the person who may be declared to be entitled to it, in no way improves or prejudices the legal position of either party against the other, but that it is the duty of the court to see that the money is paid out as directed and required by the contract of insurance, and that the party who succeeds must make out a case which would have entitled him to recover against the society in a suit on the contract.³

¹Schwarzbach v. Union, 25 W. Lodge, 38 Mo. App. 543; Supreme Va. 622; Kern v. Zeigler, 13 W. Va. Council v. Bennett, 47 N. J. Eq. 39; 707; Smith v. Lewis, 24 Conn. 621; 19 Atl. Rep. 785; Ballou v. Gile, 50 Borden v. Borden, 5 Mass. 67; Smith Wis. 614; Wendt v. Iowa Legion of v. Smith, 25 Wend. 405; Williams v. Honor, 72 Iowa, 682; 34 N. W. Rep. Bank, 2 Peters 96; as to surrender of 470. In the Wendt case it was contended that the company only could certificate, see Mulroy v. Supreme tended that the company only could object to the insufficiency of the Lodge, 23 Mo. App. 463; Bock v. A. change of the beneficiary, and as it O. U. W., 75 Iowa 462. A failure to had paid the money into court, it surrender the certificate according to had recognized the change as valid, the terms of the contract may affect but the court expressly dissented the question of interest; see § 360.

²Britton v. Supreme Council, 46 N. J. Eq. 102; 18 Atl. Rep. 675; Crokatt v. Ford, 25 L. J. Ch. 552.

³See § 222; Grand Lodge v. Sater, 44 Mo. App. 445; Keener v. Grand sum of \$3,000 which she claimed was

In some cases the rights of the parties were adjudicated upon without reference to the fact that the society had paid out the money.¹ In other cases the fact that the money had been paid into court by the society, without objection to the manner in which one of the parties had been designated as a beneficiary, or without objecting to him as an improper beneficiary under the contract, has been commented on as tending to give him a better standing in court.²

In one case it was said: "The society has paid the money into court, and has been released from all obligation respecting it. This payment, however, is an admission on its part that the benefit certificate was rightly issued, and hence all contention as to whether its rules and regulations respecting

due to her upon a benefit certificate held by her husband at the time of his death. The society did not dispute the indebtedness, but alleged that several other persons made claim to the benefit fund, naming such persons, asked to be permitted to pay the money into court, and that the contestants for the fund be made defendants in its place; and thereupon it was permitted to, and did pay the money into court. The contestants were made defendants in its place, and the action was dismissed as to the society. In discussing the effect of this payment of the fund into court, the supreme court of Wisconsin said: "The fact that the association has paid the money into court, instead of paying it directly to the widow, to avoid litigation with the other claimants, can make no difference as to the rights of the persons claiming the same. If the appellant could not have recovered this money in a direct action against the association, he can not recover it in this action. The association not having, for prudential reasons, paid the money to the party entitled thereto, the court must see that it is paid out as directed and required by the rules

and regulations of the society. * * * It is quite immaterial whether the local council or the supreme council have the right, under the rules and regulations of the order, to direct to whom the money shall be paid, in case the brother has failed to designate the person in the manner prescribed by such rules. The money having been paid into court, the court must now determine who is the proper person to receive the money, irrespective of the action of either council." In *National Life v. Pingrey*, 141 Mass. 411, it is said that one who interpleads assumes that he is merely a stakeholder.

¹ *Vollman's Appeal*, 92 Pa. St. 50; *Stephenson v. Stephenson*, 64 Iowa 534; *Knights of Honor v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826; *Day v. Case*, 43 Hun 179; see *Mellows v. Mellows*, 61 N. H. 137; *Holland v. Taylor*, 111 Ind. 121; 12 N. East. Rep. 116; *Hotel Men's Mutual v. Brown*, 33 Fed. Rep. 11; *Ireland v. Ireland*, 42 Hun 212.

² *Johnson v. Knights*, 53 Ark. 255; 13 S. W. Rep. 794; *Gladling v. Gladling*, 8 N. Y. Supp. 880; see *Lamont v. Grand Lodge*, 33 Fed. Rep. 177.

these matters had been complied with is out of the case, and is entirely disposed of.”¹

A bill of interpleader by a society to determine conflicting claims to the proceeds of a certificate, the money having been paid into court, is not a proceeding *in rem*; and a judgment by default against a claimant who is served outside of the state and who does not appear in the suit, is a nullity.²

§ 355. **Payment of a less amount than is due, receipt in full.**—Where payment of a smaller amount than is actually due to the beneficiary is accepted, a receipt in full given, and the certificate surrendered on the faith of the statement made to the beneficiary by the officers of the society that such sum was all he was entitled to on the certificate, the remainder due on the certificate may be recovered, if such statement is incorrect in law, and false in fact.³ The son of a member of a mutual benefit society was in fact entitled to the whole fund payable on his father's death, but his guardian on making claim therefor was informed by the president that only a part of the fund was due to the son, and that the balance belonged to another person who had been named as a beneficiary. The guardian, in good faith, without disputing this, accepted a smaller sum and signed a receipt in full. The remainder of the money was then paid to the person supposed to be entitled thereto. It was held that a suit might still be maintained by the son for the balance of the fund, and that the guardian's passive assent to the payment of the balance to the wrong person did not amount to an estoppel. In such a case, the receipt of a part of the sum due is not a consideration sufficient to support a release executed by the guardian to the society in full satisfaction of the entire sum due.⁴ A member of a mutual benefit society died holding a certificate which provided for the payment of \$1,000 to his widow on certain conditions. It was claimed that one of these conditions was broken, in that the member had not paid his dues and assessments promptly, and that the society was not liable to the widow on the certifi-

¹ Titsworth v. Titsworth, 40 Kan. 571; 20 Pac. Rep. 213; citing Manning v. A. O. U. W., 86 Ky. 136; 5 S. W. Rep. 385; and Splawn v. Chew, 60 Texas 532; see Knights of Honor v. Watson, 64 N. H. 517; 15 Atl. Rep. 125; 6 N. Eng. Rep. 88C; see § 222.

² Gary v. Association (Iowa), 50 N. W. Rep. 27.

³ York Association v. Myers, 11 W. N. Cas. 541.

⁴ Tyler v. Association, 145 Mass. 134; 13 N. East. Rep. 360.

cate. But the by-laws of the society provided as follows: "The heirs of a deceased member, who through tardy payment has come out of benefit, can claim no more than \$50 at the death of a male member." The society refused to pay her anything on the certificate, but paid her \$50, and took her receipt in full of all claim upon the society. Afterward she brought an action upon the certificate, and the society set up the payment of the \$50 in bar of the action. The court held that the receipt of this money did not prevent her from maintaining an action for the recovery of the sum actually due.¹

§ 356. **Settlement procured by the fraud of the society.**—Where a life insurance company by its authorized agent falsely and fraudulently represents to the assured's executor, whose mental faculties are at the time impaired by age, financial disasters and domestic affliction, that sufficient evidence has been discovered to avoid the policy, and that such company will contest and defeat its collection, and thereby procures a settlement of the claim and a surrender of the policy by payment of an amount grossly unjust to the estate of the assured, such settlement may be set aside, and the remainder due on the policy recovered. The fact that the insurance company paid such money to the executor a few days before he could have legally demanded and enforced its payment is immaterial, where it does not appear that such payment constituted any part of the consideration for the settlement.² When the will of the beneficiary has been coerced by threats, or constrained and overpowered by any form of intimidation which is attempted to be practiced upon him, the court will relieve him from the consequence of his act in making a settlement with the society at a smaller sum than is due and giving a receipt in full of all claims.³ The question whether a settlement and receipt in full were obtained by duress and fraud is one of fact to be submitted to the jury.⁴ A contract of settlement

¹ *Kapka v. Order Germania*, 7 N. Y. Weekly Dig. 197; see *Ryan v. 224*; *Fisher v. Bishop*, 108 N. Y. 25; *Ward*, 48 N. Y. 207. 36 Hun 112; 13 N. Y. St. Rep. 466;

² *McLean v. Ins. Co.*, 100 Ind. 127; *Sheanon v. Ins. Co.*, 77 Wis. 618; 53 50 Am. Rep. 799; see *Home Ins. Co. N. W. Rep.* 878. *v. Howard*, 111 Ind. 544.

³ *Stowell v. Association*, 23 N. Y. St. Rep. 706.

and cancellation fraudulently procured by the society is voidable, but not void; and, hence, in an action upon a certificate as a valid subsisting obligation, such a contract constitutes an insuperable barrier against a recovery so long as it is not rescinded or avoided by an offer to return the consideration paid for it.¹

But an action against a society for damages sustained through its fraudulent representations, inducing a settlement of a loss, is in affirmance of the settlement. A person may retain the property received through a fraudulent transaction, and sue for the damages sustained by the fraud perpetrated upon him. He may affirm the contract and recover the damages sustained by him.² Such an action, being in affirmance of the settlement, does not violate a provision therein that plaintiff will warrant and defend the payment made thereunder against any and all claimants; and such an action is not within a by-law of the society providing that no action shall be sustained in any court of law or equity on any death claim unless the same shall be commenced within twelve months after the death of the member.³

A beneficiary, who has settled his claim against the society

¹ *McMichael v. Kilmer*, 76 N. Y. 36; *Gould v. Bank*, 86 N. Y. 75; *Bisbee v. Ham*, 47 Maine, 543; *Potter v. Ins. Co.*, 63 Me. 440; *Worley v. Moore*, 97 Ind. 15; *Brown v. Ins. Co.*, 117 Mass. 479; *Home Ins. Co. v. Howard*, 111 Ind. 544; 13 N. East. Rep. 103; *Norwich Union v. Girtton*, 124 Ind. 217; 24 N. East. Rep. 984. Where a creditor is induced by the fraud of the debtor to settle an undisputed claim for a smaller sum than is due, he may bring suit for the remainder of the claim without rescinding the composition agreement. *Hefter v. Cohn*, 73 Ill. 296; *Pierce v. Wood*, 3 Foster (23 N. H.) 519; *Reyndes v. French*, 8 Vt. 85; *Bank v. Hoeber*, 8 Mo. App. 171; *Seving v. Gale*, 28 Ind. 486. But where a person has been induced by fraud to compromise a disputed claim which he holds against another, he may rescind by restoring, or offering to restore, what he has received as a consideration for the compromise; and he may then maintain an action at law, treating the compromise as rescinded. Or, instead of rescinding and suing at law, he may keep what he has received, and sue in equity to rescind the fraudulent compromise, and to obtain in the same action equitable relief, offering in his bill to restore what he has received, if it shall be adjudged that he is not entitled to retain it. *Home Ins. Co. v. Howard*, *supra*; *Gould v. Bank*, *supra*.

² *Wabash Union v. James* (Ind. App.), 35 N. East. Rep. 919; *English v. Arbuckle*, 125 Ind. 77; 25 N. East. Rep. 142.

³ *Wabash Union v. James*, *supra*.

disadvantageously, under pressure not amounting to fraud, can not maintain an action for further recovery.¹

§ 357. **A member may not enjoin payment.**—A member of the society, as such, has no interest in the benefit fund, and can not maintain a suit to enjoin the society from paying it to a person who claims to be the beneficiary under one of its certificates.²

§ 358. **Payment procured by fraud.**—Where a beneficiary procures the payment of the benefit fund to be made to him, by false and fraudulent proof of the death of the member, the member being in fact still alive, the society may maintain an action against the beneficiary to obtain the money so fraudulently obtained by him.³ And such action may be maintained notwithstanding the illegality of the contract of insurance, by reason of the fact that the society was not authorized to do business in the state where it was executed.⁴ On presentation of proofs of the death of the insured, a society paid the benefit fund; subsequently it was ascertained that he was not dead, and the society brought suit to recover the money as having been obtained by misrepresentation. It appeared that the beneficiary acted in good faith, and the society was permitted to recover only on condition that it redelivered to him the policy as a valid and subsisting contract.⁵ Where the society might have ascertained certain facts upon due inquiry, but paid the claim without having examined into them, it can not recover the payment, unless there was a fraudulent concealment of the facts.⁶

§ 359. **Right to double payment.**—The Iowa Grand Lodge, A. O. U. W., separated into two bodies, each claiming to be legitimate, and claiming the members of the former grand lodge as its own. A member who was then past the age of eligibility to original membership, united with the rival lodge, but

¹ Maguire v. Ins. Co., 23 Mich. 105; Aetna Ins. Co. v. Brown, 33 Ohio St. 283.

² Elsey v. Association, 142 Mass. 224; 7 N. East. Rep. 844; see Sands v. Hill, 42 Barb. 65.

³ N. W. Mutual v. Elliott, 5 Fed. Rep. 225; Hartford Ins. Co. v. Matthews, 102 Mass. 221; McConnell v. Ins. Co., 18 Ill. 228.

⁴ N. W. Mutual v. Elliott, *supra*.

⁵ North Brit. Ins. Co. v. Stewart, 9 C. S. Cases, 3d series. 534.

⁶ National Life v. Minch, 53 N. Y. 144; Smith v. Ins. Co., 62 N. Y. 85; American Ins. Co. v. Crawford, 89

Ill. 62.

received no new certificate. He retained membership in, and continued to pay dues and assessments to both lodges. After his death the certificate was paid by one lodge and surrendered to it properly receipted. A claim was made against the other lodge, and an assessment to pay it was levied and collected, but payment was refused, because of the claimant's inability to surrender the certificate. In a suit to collect the proceeds of this assessment, it was held that there was but one contract of insurance, each of the state organizations recognizing this contract as valid, because each had at all times claimed the old members as lawfully owing allegiance to but one governing body, and that the levying of the assessment did not create an estoppel.¹

§ 360. **Interest on the amount of the benefit fund.**—It was held in an English case in 1823 that, as interest was allowed by law only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade or other circumstance, the assured was not entitled to recover interest on the principal sum insured, from the expiration of the specified time after due proof of death.² Afterward it was held that the assured could not recover interest, unless he had made a distinct application to the insurer to pay the amount of the loss, and had notified the insurer of the ground of his application.³ In this country it has been held that, in fire insurance, where there is no doubt as to the amount of the loss, interest will be allowed from the time specified in the policy, but where the preliminary proofs are indefinite in this particular, no interest will be allowed;⁴ and it has been further held that whatever is due, becomes due and payable within the time fixed by a policy, after tender of proofs, and will bear interest from that date; that though the amount may be controverted by proof, and the true amount may be variable, yet that does not change the principle.⁵ A

¹ Bock v. A. O. U. W., 75 Iowa 462; ⁴ McLaughlin v. Ins. Co., 23 Wend. 39 N. W. Rep. 709; see §§ 256, 353. 525; Bridge v. Ins. Co., 1 Hall (N.

² Higgins v. Sargent, 2 Barn. & Cress. 348. ⁵ Peoria Ins. Co. v. Lewis, 18 Ill.

³ Bain v. Case, 3 Car. & Payne 496 553. (1829); S. C., 1 Moody & Malkin's Repts. 262.

policy of life insurance is a contract to pay a certain sum of money at a certain time after the death of the insured, and it is proper to allow interest on this sum from the time it becomes payable.¹ This rule obtains in mutual benefit insurance where the amount to be paid is to be determined by a levy of an assessment. Interest should be added to the amount which would have been realized by an assessment, from the time it should have been levied in the regular course of the business of the society.² But where, according to the terms of the contract, the society is not required to pay until the certificate is surrendered, the person entitled to the fund must tender it before a claim for interest accrues.³

It has been held that in an action to compel the society to levy an assessment upon the surviving members to pay a death loss, the plaintiff is not entitled to interest.⁴

§ 361. **Proceedings to obtain payment of judgment.**—The widow of a deceased member of a mutual benefit society having obtained judgment against the society for the amount of the benefit due her as such widow, and execution on the judgment having been returned unsatisfied, applied to the court in which the judgment was rendered for a *mandamus* to compel the society to make an assessment upon the members of the society sufficient to pay the judgment. The supreme court of Michigan, in deciding that such an action could not be maintained, said: "The respondent is a corporation existing under the laws of this state. The relator has obtained a judgment against the corporation, and execution has been returned unsatisfied. No further proceedings at law can be resorted to to enforce collection. Whether the corporation is solvent or in-

¹ Knickerbocker Ins. Co. v. Gould, 76 Iowa 56; 40 80 Ill. 388; Mass. M. L. Ins. Co. v. N. West. Rep. 87; Stowell v. American Robinson, 98 Ill. 324; Supreme Lodge Association, 23 N. Y. St. Rep. v. Zuhlke, 129 Ill. 298; 21 N. East. 706; see authorities in preceding Rep. 789; Brown v. Assurance Co., note.

45 Mo. 221; Supreme Council v. ³ Britton v. Supreme Council, 46 Franke, 137 Ill. 118; 27 N. East. Rep. N. J. Eq. 102; 18 Atl. Rep. 675; see § 353.

86; Heisler v. Stose, 131 Ill. 393; 23 N. East. Rep. 347; Hanover Ins. Co. ⁴ Courtney v. Association (Iowa), v. Lewis, 28 Fla. 209; 10 So. Rep. 53 N. W. Rep. 238; but see N. W. Association v. Schauss, 148 Ill. 304; 297.

² Perine v. Grand Lodge, 51 Minn. 35 N. East. Rep. 747.
224; 53 N. East. Rep. 367; Newman

solvent can not be made to appear until an investigation has been had. Whether the sequestration provided for under the statute (How. St. § 8153) is proper or not, or whether resort should be had to assessments to satisfy the relator's claim, are questions that can not be properly considered upon this motion. They necessarily involve a construction of the statute under which respondent company is organized, and a construction of the articles of association, and the by-laws made thereunder as well; and that construction will, to a greater or less extent, be modified by circumstances surrounding each particular case wherein it is sought to be applied. It is manifest that *mandamus* is entirely inadequate in this class of cases, and that equity alone can furnish the proper remedy. Sequestration can be had in no other court. The examination of the affairs of a corporation, and the legal proceeding by which its assets are taken and applied to the payment of its debts, are particularly subjects of equitable cognizance, and what acts should be done or performed by its officers in the payments of its debts can only be ascertained and enforced when the true situation of the corporation is fully known, and its ability to pay and means of payment are judicially established. A court of equity is the proper forum for such proceedings, and the writ in this case must therefore be denied."¹

§ 362. **Restricting the operation of the judgment against a society.**—After a general verdict has been rendered against a mutual benefit society for a breach of its covenant to make, levy and collect assessments on its members to pay the plaintiff's claim, it is error, in the judgment or after judgment rendered thereon, by order, to restrict the operation of the verdict, judgment and execution to assessments collected and to be collected by the society from its members. The verdict in such a case is the amount of damages for the default of the

¹ *Miner v. Association*, 65 Mich. the person obtaining such judgment 84; 31 N. W. Rep. 763; How. St. or decree, or his representatives, the § 8153. "Whenever a judgment at circuit court within the proper law or a decree in chancery shall be county may sequester the stock, obtained against any corporation property, things in action, and effects under the laws of this state, and of such corporation, and may appoint an execution issued thereon shall point a receiver of the same." See *People v. Masonic Association*, 126 N. Y. 615.

society, and judgment should be for that amount absolutely. Having a judgment in his favor for the amount of his damages, the plaintiff has the undoubted right to collect it by any means the law affords him.¹ The by-laws of a mutual benefit society provided that losses should be paid by bi-monthly assessments, that each loss should be payable *pro rata* out of the next assessment after proof of death, or if the claim were contested, and judgment recovered against the society thereon, the judgment should be paid *pro rata* out of the assessment next after its rendition. A claim having been contested and reduced to judgment in another state, suit was brought on the judgment. It was held that the facts that the *pro rata* share of the assessment next after the judgment would amount to less than the judgment, and that the society had disputed the claim, believing it to be unjust, constituted no reason for not paying the judgment in full, since the extent of the liability of the society was determined by the judgment.²

¹ Seitzinger v. New Era Life Association, 111 Pa. St. 557; McKnight v. New Era Life Association, 15 Weekly Notes of Cases, 400.

² People's Mutual v. Werner, 6 Ind. App. 614; 34 N. East. Rep. 105.

PART III.

THE LAW OF ACCIDENT INSURANCE.

THE LAW OF ACCIDENT INSURANCE.

CHAPTER XXVII.

ACCIDENT INSURANCE.

§ 363. Generally.

364. What is an accident ?

365. Negligence on the part of the insured contributing to the injury.

366. Due diligence for personal safety and protection.

367-372. Voluntary exposure to unnecessary danger; obvious risk.

373-378. External, violent and accidental means.

379. External and visible sign.

380, 381. The nature, cause or manner of death unknown, or incapable of direct and positive proof: burden of proof.

§ 363. **Generally.**—While accident insurance is of modern origin, it has become an established branch of business, both in this country and in England. The first company organized in England was formed in London in 1848, and the first American company was formed about 1863. The history of accident insurance companies in this country records a few successes and many failures, and at the present time the business is done by a very few regular companies and a large number of mutual benefit societies. In life insurance there are standard life tables which give, as the result of many years of observation and compilation, the death rate, and from which the expectation of a life may be computed; but as yet no accident tables have been published, and there are no statistics known to the public from which the probability of accidental injury or death in a given case may be determined. The several companies keep their own records and statistics, but do not make known the results of their labors. It is frequently stated, however, that the claims for injuries or death arising from accidents in travel by rail or water do not aggregate seven per cent of those made against accident companies, while the claims growing out of the use of horses and carriages exceed in number those arising from all other causes combined.¹

¹ 7 Am. L. Reg. 583.

There are two plans of doing business in accident insurance. In one, the organs of the body are appraised at a specified sum, and the company agrees to pay a certain fixed amount for the loss of a hand, the breaking of a leg, the loss of an eye, etc. This system is used almost entirely in Europe. By the other plan, the company insures indemnity for injury by payment of a specified weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum if the insured dies in consequence of an accident. This is called the American system, though the two plans are sometimes in a great measure combined in the policies issued here. Some policies cover all classes of accidents, while others are limited to those of a specified nature, as, for instance, accidents while traveling by public conveyance. Accident insurance is more analogous to fire than to life insurance, being a provision for indemnity, except in case of death by accident, when it becomes a contract to pay a fixed sum, and, as a general rule, the law of fire and life insurance applies also to accident insurance.

§ 364. **What is an accident?**—Courts have in many cases been called upon to decide whether injury from particular causes was, or was not, accidental, but as yet they have laid down no definition of an accident, which has been generally accepted as satisfactory. An accident has been defined as “an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected;”¹ “an event which takes place without the oversight or expectation of the person acted upon or affected by the event;”² “an unusual and unexpected result attending the performance of a usual act;”³ “an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone or from the joint operation of both;”⁴ “not merely inevitable

¹ Webster’s Dict.

310; *U. S. Association v. Barry*, 131

² *Ripley v. Ins. Co.*, 2 Bigelow’s L. U. S. 100.

& Acc. Cases 738; *Richards v. Ins.*

⁴ *Morris v. Platt*, 32 Conn. on pg.

Co., 89 Cal. 170; 26 N. East. Rep. 762. 85.

³ *Provident Life v. Martin*, 32 Md.

casualty, or the act of God, or what is called *vis major* or irresistible force, but rather such unforeseen events, misfortunes losses or omissions as are not the result of any negligence or misconduct in the party who seeks the relief."¹ It is something which happens by chance, or does not take place according to the usual course of things.² Some violence, casualty or *vis major* is necessarily involved in the term "accident."³ It means, in short, in insurance policies, an injury which happens by reason of some violence, casualty or *vis major* to the assured, without his design or consent, or voluntary co-operation.⁴

§ 364a. "Horse or vehicle policies," insuring an employer against liability for accidental injuries to others than employes, caused by horses or vehicles of the assured; "elevator policies" insuring against accidental or personal injuries caused by elevators or their appurtenances; "general liability policies," insuring against liability for accidental personal injuries to any persons other than employes or persons injured by elevators, for which the assured may be liable as landlord or tenant; and "outside liability policies," insuring builders and contractors against liability for accidental personal injuries to workmen employed by other contractors, and to the public, caused by the assured or by his workmen—are "accident" insurance policies within the meaning of an act providing that companies may be formed to insure against "bodily injury and death by accident," and within a certificate issued by the commissioner entitling a foreign company to transact "accident insurance" in the state.⁵

§ 365. **Negligence on the part of the insured contributing to the injury.**—It has been repeatedly held in this country and in England that the contract of insurance is an exception to the rule which denies compensation for an injury of which

¹ *Alexander v. Bailey*, 70 Tenn. (2 Travelers' Ins. Co., 112 N. Y. 472; 20 Lea) on pg. 639; *Wait's Actions and Defenses*, Vol. 1, 162; *Story's Equity*, Vol. 1, Sec. 78.

² *Schneider v. Ins. Co.*, 24 Wis. 28; *N. A. Ins. Co. v. Burroughs*, 69 Pa. St. 43; *Barry v. Accident Association*, 23 Fed. Rep. 712; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; *Paul v.* 155 Mass. 404; 29 N. East. Rep. 529.

³ *Sinclair v. Assurance Co.*, 107 Eng. Com. L. (3 El. & El.) 478.

⁴ *Am. L. Review*, 588; *Duncan v. Association*, 13 N. Y. Supp. 620; 1 *Am. & Eng. Encyc. Law*, pg. 87.

⁵ *Employers' Liability Co. v. Merrill*

the party's own negligence or want of due care has been the cause, and it may be laid down as the settled law of insurance, whether life, fire, accident or marine, that, unless there is a stipulation to the contrary, mere negligence or carelessness on the part of the insured or others is no defense to a policy. Protection against such casualties is one object of insurance.¹ But a company may stipulate that it does not assume a certain risk, and an injury arising from the negligence of the insured may be excepted from the benefits of the contract.² Such negligence as raises a presumption of bad faith, amounting to fraud or design, avoids a policy;³ and negligence which amounts to misconduct is not insured against.⁴

The fact that a person insured against injury or death by accident was guilty of negligence which contributed to an injury received by him, will not prevent a recovery on the policy, where such policy merely provides that it does not extend to injuries by reason of his "willfully and wantonly exposing himself to any unnecessary danger or peril."⁵

¹ National Ins. Co. v. Webster, 83 Ill. 470; Waters v. Ins. Co., 11 Peters 213; Columbian Ins. Co. v. Lawrence, 10 Peters 507; Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Nelson v. Ins. Co., 8 Cush. 477; Sanford v. Ins. Co., 12 Cush. 541; Cumberland Valley Mutual v. Douglas, 58 Pa. St. 419; William v. Ins. Co., 31 Me. 219; Germania Ins. Co. v. Sherlock, 25 Oh. St. 33; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; Walker v. Maitland, 5 Barn. & Ald. 175; Dixon v. Sadler, 5 Mees. & Wels. 405; Shaw v. Robberds, 6 Ad. & El. 75; Miller v. Mutual Benefit Life Ins. Co., 31 Iowa 216; Holterhoff v. Ins. Co., 4 Big. Life & Acc. Cas. 395; U. S. Association v. Barry, 131 U. S. 100.

² Travelers' Ins. Co. v. Seaver, 19 Wall. 539; City v. Ins. Co., 9 Gray (Mass.) 97.

³ Toledo, etc., R. W. Co. v. Pindar, 53 Ill. 447; Henderson v. Ins. Co., 10 Rob. (La.) 164; see authorities above cited; see also Aurora Ins. Co. v. Johnson, 46 Ind. 315.

⁴ Chandler v. Ins. Co., 3 Cush. (Mass.) 328; Levi v. Ins. Co., 2 Wood (U. S. C. Ct.) 63; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; May on Insurance, §§ 408, 411.

⁵ Schneider v. Ins. Co., 24 Wis. 28. The court said: "A very large proportion of those events which are universally called accidents, happen through some carelessness of the party injured, which contributes to produce them. Thus, men are injured by the careless use of fire-arms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterward that a little greater care on their part would have prevented it."

* * It is true that accidents often happen from such kinds of negligence. But, still, it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number

In Kentucky it was held in an early case, where there was no provision in the policy concerning the use of due care on the part of the insured for his personal safety, "that if a party causes or contributes to the accident, the company is not lia-

in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle, the servant fills the lighted lamp with kerosene—a hundred times without injury. The next time the gun is discharged, and the lamp explodes. The result is unusual, and therefore as unexpected as it had been in all the previous instances. So there are, undoubtedly, thousands of persons who get on and off from the cars in motion without accident, where one is injured. And, therefore, when an injury occurs, it is an unusual result and unexpected, and strictly an accident." See *Tooley v. Assurance Co.*, 3 Bissell 399; 2 Ins. L. J. 275. Where the contract exempts the insurer in case of willful and wanton exposure of the insured to any unnecessary danger or peril, contributory negligence on the part of the insured will not prevent a recovery, where he received the injury in consequence of getting from the platform at a railroad depot upon the cars while in motion at a rate of speed less than that of a man walking. In *Schneider v. Ins. Co.*, *supra*, it was said: "The question, therefore, remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a 'willful and wanton exposure of himself to unnecessary danger.' I can not think so. The evidence showed that the train, having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected

the train to stop there again before finally leaving. But it did not. It came along, and, while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and, by some means, fell either under or by the side of the cars, and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, if there had been any. But it does not seem to have contained those elements which could be justly characterized as willful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left, unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employes were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times, without injury. I can not regard it, therefore, as a willful and wanton exposure of himself to unnecessary danger, within the meaning of the policy." In *Champlain v. Assurance Company*, 6 Lans. (N. Y.) 71, it was held that an accident policy, covering risks while traveling, insured the holder against an accident which occurred while he was getting into a public conveyance for passengers, while in

ble, and, therefore, where the insured inadvertently put his arm out of the window of a railroad car, and it was hit by a post, so that he was disabled for many weeks, as the accident was produced by his fault, and resulted from the dangerous position in which he had needlessly and negligently placed his arm, and which, if not to be expected from the position in which he placed it, was at least probable, and as it did not result from any of the dangers common to passengers upon that or other railroads, he had deprived himself of all right to compensation."¹ But this decision has been generally condemned as being unsupported by reasoning or precedent.² It is undoubtedly true, however, that where the negligence of the insured has been so gross as to raise the presumption that he designed the infliction of the injury, or where he has recklessly, willfully and wantonly exposed himself to unnecessary danger, he can not recover, though there be no provision in the contract as to due care on his part, for no man can be permitted in a court of justice to profit by his own wrong; he can not lay the foundation of a claim to insurance in his own reckless and willful act or misconduct. It is incumbent on the company in such cases to prove the misconduct and gross negligence of the insured.

§ 366. Due diligence for personal safety and protection.

—It is common for accident insurance policies to contain a provision that the insured shall use due care for his personal safety. When the contract contains such a provision, negligence or want of due care on the part of the insured will avoid it. Under such a contract it is always a question of fact for

motion. In cases where the foundation of the action is an injury occasioned by the negligence of the defendant, and the liability of the latter grows out of such negligence, it is always a good defense to show contributing negligence on the part of the plaintiff, but the rule is different where the liability of the defendant is created by a contract, one of the chief objects of which is to protect the insured against his own mere carelessness or negligence. Unless stipulated in the

contract, the observance of due care and diligence on the part of the assured, is no element of the contract on his part, and can in no way affect the right of action thereon. *Providence Life v. Martin*, 32 Md. 310; *Tooley v. Assurance Company*, 3 Biss. 399; 2 Ins. L. J. 275.

¹*Morel v. Ins. Co.*, 4 Bush (Ky.) 535; see dictum in *Brown v. Ins. Co.*, 45 Wis. 221.

²*Bliss on Insurance*, § 400; *May on Insurance*, § 530; 7 *American Law Review* 594.

the jury to determine, under all the circumstances of the case, whether the exposure of the insured to the injury done was such as a prudent man would subject himself to, and whether, in doing or omitting to do an act, he exercised that degree of care which a prudent man would exercise.¹ The requirement that the insured shall "use all due diligence for personal safety and protection" is a very general phrase, and does not mean that he may not recover for an accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. Due diligence or care is a relative, not a precise term, and is consistent with inadvertence or with running such risks as prudent and cautious persons habitually run. It would not be reasonable to hold that this clause requires of the insured a higher degree of diligence than prudent persons are accustomed habitually to use.² The question of negligence is not always to be tried by the same tests, for what a prudent man might naturally do under some circumstances he might shrink from doing under others; and it is therefore necessary that the jury should be enlightened as to the particular facts of each case. Where the assured, in building a barn, stepped upon a joist in the second story to examine the work, fell from there and died from the injuries received, it was shown to the jury that he was an awkward man, that he had on two overcoats at the time of the accident, and that the joist broke from a concealed defect, causing his fall to the ground. The court held that it was for the jury to say whether the deceased had used "all due diligence for personal safety and protection;" and that their verdict against the company was warranted.³ The insured was struck by a locomotive engine while he was walking along a railroad track, and it was held that he had not used due diligence for his protection.⁴ In an action on an accident insurance policy it appeared that the insured, while

¹ Providence Life v. Martin, 32 Md. 310; Travelers' Ins. Co. v. Seaver, 19 *supra*; Wilson v. Association (Minn.), Wall. 531; Adm'rs of Stone v. Casualty Co., 34 N. J. L. (5 Vroom) 371; ² 2 Ins. L. J. 275. ³ Adm'rs of Stone v. Casualty Co., 55 N. W. Rep. 626. ⁴ 7 Am. L. Review 595; Cornish v. Tooley v. Assurance Co., 3 Biss. 399; Ins. Co., 23 L. R., Q. B. D. 453.

² Keene v. Association (Mass.), 36 N. East. Rep. 891.

crossing railroad tracks in going to the station, when part way over, had his view obstructed of the further track, and, as he was approaching it, was called to by an employe of the railroad company to "look out for the express," and was shouted to by others, and, hastening forward, was killed by the express train. It was held that the question whether he had used "all due diligence for personal protection," as required by the policy, was for the jury.¹ Where the insured is required by the contract to use all due diligence for his personal safety and protection, no recovery can be had for his death, caused by his being struck by a railroad train, while running along the track in front of it in the night time, for the purpose of getting on a train approaching in an opposite direction on a parallel track.² A passenger on a railway car, who was injured by being thrown from the steps of the car, where he was standing while the train was approaching a station, is not entitled to recover on a contract providing for the exercise of due diligence on the part of the insured for self-protection.³

It is not negligence *per se* to ride on the platform of a street car.⁴ Whether one is exercising due diligence for his personal safety in crossing in the day time the railroad tracks at a station at a place where they were commonly crossed by persons, and in carrying at the time, to protect himself from rain, an umbrella which cut off his sight of the tracks, is a question to go to the jury.⁵ To climb over or between stationary cars, without looking to see whether they are attached to an engine or not, is gross negligence, and precludes a recovery for injuries received while making the attempt.⁶ If an injury happen while the insured is traveling and is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care. But when he leaves such a place and occupies an exposed position, as upon

¹ *Duncan v. Preferred Mut. Acc. Ass'n*, 13 N. Y. S. 620. 231; 42 N. W. Rep. 936; *Sawtelle v. Assurance Co.*, 15 Blatchford 216.

² *Tuttle v. Ins. Co.*, 134 Mass. 175; ⁴ *Sutherland v. Standard L. & A. Lovell v. Ins. Co.*, 3 Ins. L. J. 877; *Ins. Co. (Iowa)* 54 N. W. Rep. 453; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; 7 S. E. Rep. 83. *Nolan v. Railway Co.*, 87 N. Y. 63.

⁵ *Keene v. Association (Mass.)*, 36

³ *Bon v. Assurance Co.*, 56 Iowa 664; N. East. Rep. 891.

see *Marx v. Ins. Co.*, 39 Fed. Rep. . . ⁶ *Beam v. Assurance Co.*, 50 Mo. 321; *Hull v. Accident Ass'n*, 41 Minn. App. 459.

the platform of a car, it must appear upon some ground of necessity or propriety, that his position was consistent with the exercise of proper care and caution on his part.¹ Where it is a condition of the policy that "the party insured is required to use all due diligence for personal safety and protection," the burden is on the company to show that he has not used all due diligence.² Where, in a suit on a policy, providing that the assured, a railroad switchman, should at all times use due care for his personal safety, the company pleads that the assured failed to use due care, but contributed directly to his injury by getting off a moving engine with his back in the direction in which it was going, a replication which does not deny that the assured failed to use due care, but only alleges that he was insured as a switchman, and that the injury occurred while in the discharge of his customary duties, is insufficient in assuming that the policy would cover all such injuries, whether the assured was in the exercise of due care or not.³

§ 367. **Voluntary exposure to unnecessary danger—Obvious risk.**—Negligence and "exposure to unnecessary danger" have been held to be equivalent terms,⁴ but there is a difference between negligence and "willful and wanton exposure to unnecessary danger."⁵ As was stated in a preceding paragraph, where the liability of a company is created, not by negligence, but by a contract, one of the principal objects of which is to protect the insured against his own mere carelessness, contributing negligence on his part is not a good defense

¹ *Bon v. Assurance Co.*, *supra*; which courts have recognized, in *Hickey v. R. R. Co.*, 14 Allen (Mass.) 429; *Lucas v. R. R. Co.*, 6 Gray 64; to allege and prove the want of compliance with any particular proviso or condition on which it relies as a defense. *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377; *Duncan v. Association*, 13 N. Y. Supp. 620; *Badenfeld v. Association*, 154 Mass. 77; 27

² *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 12 N. East. Rep. 372; ³ *Standard Life v. Jones*, 94 Ala. 16 Ins. L. J. 822; 36 Alb. L. J. 127. 434; 10 So. Rep. 530.

The court was divided upon the point. In an action on a policy containing many provisos and conditions, there is a practical wisdom, see § 365.

⁴ *Sawtelle v. Assurance Co.*, 15 Blatchford 216.

⁵ *Schneider v. Ins. Co.*, 24 Wis. 28;

to such liability, unless there be a stipulation that the contract shall not extend to death or injury caused by his negligence, by his want of due diligence for his self-protection, or by voluntary exposure to unnecessary danger. Where some such limitation on the liability of the company is inserted in the contract, the negligence, want of diligence, or exposure of the insured, is fatal to a recovery, and is measured by much the same tests as are applied to the acts or omissions of a person who has been injured through the negligence of another;¹ and whatever would constitute contributory negligence in an action of tort may be set up as a defense to an action on such a contract. It must be remembered, however, that in an action for damages for the negligence of the defendant, the burden is on the plaintiff to show affirmatively due care on his part, and that, in an action on an accident policy, death through violent, external and accidental means having been proved, the burden of proof is on the defendant to show a voluntary exposure to unnecessary danger, or a want of due diligence. The burden of proof, therefore, is different, and the questions of due diligence and of voluntary exposure to unnecessary danger arise, not upon general principles of the law of negligence, but upon the construction of the contract of insurance against accidents. It is evident that such a contract should be construed with more liberality to the assured than the rules of the common law would be where he sought under them to put the responsibility for his accident upon another.² "Voluntary exposure to unnecessary danger," in an accident insurance policy exempting the insurer from liability for death produced from such exposure, means wanton or grossly imprudent exposure.³

A locomotive engineer, while backing his engine down a grade with a car in front as a precaution to check its speed, directed the fireman to run it, went upon and over the tender

¹ *Bon v. Assurance Co.*, 56 Iowa 664; *Scheiderer v. Ins. Co.*, 58 Wis. 13; *Sawtelle v. Assurance Co.*, 15 Blatchford 216; *Travelers' Ins. Co. v. Seaver*, 86 U. S. 531; *Cornish v. Ins. Co.*, 23 L. R., Q. B. D. 453.

² *Keene v. Association (Mass.)*, 36 N. East. Rep. 891.

³ *Manufacturers' Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945; *Equitable v. Osborn*, 90 Ala. 201; 9 So. Rep. 869; *Bean v. Assurance Co.*, 50 Mo. App. 459.

to get into this car to draw the brakes, and in doing so slipped and fell between the car and the tender, and was instantly killed, by the tender passing over his body; and it was left to the jury to say whether he had willfully exposed himself to unnecessary danger within the prohibition of the policy.¹ A contract of insurance provided: "No claim for insurance shall be made when death or injury may have happened in consequence of exposure to unnecessary danger, hazard, or perilous adventure." The assured died by falling from the platform of a railroad car, about midnight, when the train was in full motion, in attempting to pass from one car to another. The court said: "There were no disputed facts, and no disputable inferences of fact, which presented a question for the jury. The naked question, therefore, is one of law, whether or not the act of passing from car to car while the train is at full speed, and in the night time, is negligence; and this question must be resolved in the affirmative. Doubtless, circumstances of such peril might exist, as would justify a passenger in attempting to escape from the car in which he might be located; but no such circumstances were shown here. If the deceased had fallen from the platform and been injured by the breaking of the coupling between the cars, the railroad company could have successfully defended an action to recover damages, upon the ground of his concurring negligence, although it might have been shown that the coupling gave way because of defects in its fastening or material. Negligence is the absence of that care which a reasonable and prudent man would exercise under the circumstances of the case; and, can it be doubted, that a prudent man would understand that he was acting at his peril, if he attempted in the night time and while the train was under full headway, to pass from one car to another? Such are the undulations of a railway car, when the train is in rapid motion, that locomotion within the car is a task of some difficulty. The passenger moves with uncertain step, and seeks assistance by grasping the seats, as the car sways to and fro. But, the passage from car to car is attended with greater difficulty. The din and clamor of the train, the rushing of the wind and dust and smoke, the con-

¹ Providence Life v. Martin, 32 Md. 310. The jury decided that he had not.

sciousness that a misstep or miscalculation of distances may be fatal, tend to confuse or excite the faculties and disturb the judgment; and, although it is a common practice thus to pass from car to car, it is rarely accomplished without experiencing a sense of relief when it has been safely done. When darkness adds another condition of uncertainty to the attempt, there can be no justification of the act, in the mind of any prudent man."¹

§ 368. It is an "obvious risk," within the meaning of a policy for an insured to walk on a railroad track, on a dark and rainy night, at a time when he knows that trains are frequently passing upon it and other tracks lying beside it. If he is injured in so doing, it is not enough that he did not see or hear the train which struck him, because he was engaged in avoiding another train. The danger was certain and ought to be present to the mind of a man of ordinary sense and prudence. The words "obvious risk," designate not only a risk which may be readily perceived by the eye or the senses, but also one which may be perceived by the intellect. Hunting, bathing and many other acts daily done involve some obvious risk or danger, but the test seems to be whether the insured ran a greater danger than a man of ordinary or reasonable prudence would encounter.² A policy provided that no claim should be made under it "when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger," and it was held that no recovery could be had for the death of the insured, caused by his being struck by a railroad train, while running along the track in front of it in the nighttime, for the purpose of getting on a train approaching in an opposite direction on a parallel track.³

¹ *Sawtelle v. Assurance Co.*, *supra*. new force or power which inter-

² *Lovell v. Ins. Co.*, 3 Ins. L. J. 877; 5 Ins. L. J. 559; *Duncan v. Association*, 13 N. Y. Supp. 620.

³ *Tuttle v. Ins. Co.*, 134 Mass. 175. The court in this case said: "The plaintiff contends that it was not the exposure or negligence of the assured which caused his death, but the coming upon him of the locomotive engine, the bell or whistle of which may not have sounded; that this was a

vened, of itself sufficient to stand as the cause of the misfortune; that it was for the jury to determine whether or not the railroad corporation was negligent; and that, if so, the negligence of the assured, if it existed, was too remote to defeat the policy. *Louisiana Mutual v. Tweed*, 7 Wall. 44; *Milwaukee, etc., R. W. Co. v. Kellogg*, 94 U. S. 469, 475; *Scheffer v. Railroad Co.*, 105 U. S.

The assured undertook in the day time to cross the railroad tracks at a station, at a place where they were commonly crossed by persons, and he was struck and killed by detached freight cars which had been "kicked" along the track, the sight of which was cut off by an umbrella which he was carrying to protect himself from rain. It was held that his acts were not necessarily a voluntary exposure to unnecessary danger, and that a jury should determine whether or not they were.¹ The insured, on his way to work, after waiting ten or fifteen minutes, undertook to pass between cars in a freight train standing at a crossing, though he could have gone around it. He made no investigation as to whether an engine was attached or not. His foot was caught between the drawheads and mashed. It was held that the exposure was voluntary and unnecessary, and that no recovery could be had on the policy.² For a person with two packages in his hands or arms to attempt, during a dark and rainy night, by choice, to pass

249, 252. But, without speculating as to possible cases, we do not think that the doctrine relied on is applicable to this case. If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him, which there is reason to fear, it can not fairly be held that the language of this policy was not intended and understood to be applicable to such a case. For example, if one while walking on a railroad track is assaulted by a robber or a dog, or is struck by lightning, his act of traveling there has no tendency to produce the injury, and is not to be deemed a contributory cause thereof. But, on the other hand, if one who goes into a battle is hit by a bullet, or if one who goes up in a balloon is blown out to sea by the currents of air, or if one who makes a railroad track his path for travel is run over by a passing locomotive engine, he must ordinarily in any legal question be held to take the risk of those results. There is in each of these

cases such an association of cause and effect, that the one must be held to have contributed to the other. To hold that the death of the assured in the present case did not happen in consequence of his exposure to the risk, but from a new force or power which intervened, would be to fritter away the language of the policy by metaphysical distinctions too fine to enter into the understanding or contemplation of parties engaged in the practical business of making a contract of insurance. We must assume that the assured read his policy and was acquainted with its language and attached some practical meaning to it." *Travelers' Ins. Co. v. Seaver*, 86 U. S. 531; *Cluff v. Ins. Co.*, 13 Allen 308, 319; *S. C.*, 99 Mass. 317, 329; *Harper v. Ins. Co.*, 19 Mo. 506; *White v. Lang*, 128 Mass. 598; *Cornish v. Ins. Co.*, 23 L. R., Q. B. D. 453.

¹ *Keene v. Association* (Mass.), 36 N. East. Rep. 891.

² *Bean v. Assurance Co.*, 50 Mo. App. 459.

over a trestle which he knows to be dangerous, other ways of travel being open to him, is, on his part, "voluntary exposure to unnecessary danger, hazard or perilous adventure," notwithstanding this was his usual way of travel, his usual route to his home, and he and many others had been going that way for ten years.¹ The rule is well settled that a party can not walk on a railroad track without being guilty of negligence, but this means walking on a railroad track in the ordinary sense—using it as a public highway. The using of a track to cross a street or the crossing of a track at its intersection with a street is not necessarily a negligent act.² But one about to cross the track, or to use it as a street crossing, must look both ways before attempting to go upon it, and, if he omits to do that, he is guilty of negligence and voluntary exposure to unnecessary danger. An insured, after he had been warned not to do so, drove into a train yard of a railroad company, where he could have no business, became entangled in a network of tracks, and was killed by a locomotive. It was held that he had voluntarily exposed himself to unnecessary danger.³

§ 369. There is a clear distinction between a voluntary act and a voluntary exposure to danger. A hidden danger may exist, and yet the exposure to it, without any knowledge of the danger, does not constitute a voluntary exposure; nor does an approach to an unknown and unexpected danger make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary; and at the same time the exposure may be involuntary. Where the danger is unknown, the injury is accidental, and not the result of voluntary exposure. To make an insured guilty of a "voluntary exposure to danger," he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. A railway train stopped on a drawbridge at night. Several passengers alighted and stood near one end of the car. A brakeman stood near them with a lantern which was so

¹ *Travelers' Ins. Co. v. Jones*, 80 Ins. Co. v. Osborn, 90 Ala. 201; 9 So. Ga. 541; 7 S. East. Rep. 83. Rep. 869.

² *Wright v. Ins. Co.*, 29 Up. Can. C. ³ *Neill v. Ins. Co.*, 7 Can. L. J. 44; P. 221; *Duncan v. Association*, 13 N. 31 Up. Can. (C. P.) 394; 7 Up. Can. Y. Supp. 620; *Equitable Accident App.* 570.

placed that the insured could see the floor of the bridge near it, but could not see the floor at the foot of the steps of the car on which he was standing. He stepped off the car in plain sight of the brakeman, and no notice was given to passengers that it was dangerous to get out of the coach where it stood. The floor had been torn up, and instead of landing on it, he fell through a hole, and was killed. The court held, that his act of stepping off the coach was not a voluntary exposure to unnecessary danger.¹ The cleaning of a gun not known to be loaded, which is discharged, on account of an unknown defect, is not a voluntary exposure to unnecessary danger within the meaning of an accident policy.²

A complaint on an accident policy charged that the plaintiff fell asleep from weariness and the motion of the cars, and when it was quite dark "and while he was in a *dozed* and *unconscious* condition of mind, and not knowing or realizing what he was doing, *involuntarily* arose from his seat and walked *unconsciously* to the platform of said car, and, without fault on his part, fell therefrom to the ground," and was thereby injured; and it was held to sufficiently show that the injuries were not the result of voluntary exposure to unnecessary danger.³

§ 370. Whether the action of a railroad employe in attempting to board a moving train is a "voluntary exposure to unnecessary danger," within the meaning of an accident policy precluding recovery for injuries sustained by such exposure, is a question for the jury under all the circumstances of the case.⁴ Where the insured received a fatal injury while in the discharge of his regular duties as yard switchman or brakeman of a railway company, a recovery can not be defeated on the ground of voluntary exposure to danger, when the accident was one contemplated by the parties to the insurance.⁵ Where

¹ Burkhard v. Ins. Co., 102 Pa. St. 262; 48 Am. Rep. 205; Duncan v. Association, 13 N. Y. Supp. 620; Terre Haute, etc., R. R. Co. v. Buck, 96 Ind. 346.

² Miller v. Am. Acc. Company, 92 Tenn. 167; 21 S. W. Rep. 39.

³ Scheiderer v. Ins. Co., 58 Wis. 13; 46 Am. Rep. 618.

⁴ Cotten v. Fidelity & Casualty Co., 41 Fed. Rep. 506.

⁵ National Benefit Ass'n v. Jackson, 114 Ill. 533; Pacific Mutual v. Snowden, 58 Fed. Rep. 342; Wilson v. Association, 53 Minn. 470; 55 N. W. Rep. 626.

the business of the insured was known to the company, and he injured his spine by lifting a heavy burden in the course of such business, the company will not be heard to assert that the injury was occasioned by exposure to unnecessary risk.¹ The lifting or over-exertion, to take the case out of the contract, must be a voluntary and unnecessary act of the insured; one from which injury might reasonably be anticipated, and which might, in the exercise of reasonable care, have been avoided. An effort to lift, put forth in an emergency of danger, as for instance, in the effort to save one's self from being crushed by a descending weight, is not within the exception of the contract.² It is not an obvious risk or a voluntary exposure to unnecessary danger, within the meaning of a policy, for one who can swim to bathe in deep water.³ It is not a voluntary exposure to obvious risk for an insured who is subject to faintings and "swimmings in the head," to go driving in a carriage with another person.⁴

§ 371. It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought on an accident policy for injuries received or death incurred in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. While a recovery may not be had where one rashly and unnecessarily exposes himself to danger, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger, and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured or killed, the company is liable.⁵ Injuries received while attempting to rescue persons from supposed

¹ Martin v. Ins. Co., 1 Foster & Fin. 505.

² Reynolds v. Association, 17 N. Y. St. Rep't'r, 337.

³ See § 392.

⁴ Shilling v. Ins. Co., 1 Foster & Fin. 116; see § 391.

⁵ Pennsylvania Co. v. Langendorff, 48 Ohio 316; 28 N. East. Rep. 173; Linnehan v. Sampson, 126 Mass. 506;

danger are not within the exception of an accident policy that the insurance "shall not extend or cover voluntary exposure to unnecessary danger."¹ It is the duty of every person to aid in the rescue of others from perils and danger; and where an insured went to the rescue of a shipwrecked crew, and was drowned, it was held that his death was not "directly or indirectly in consequence of any voluntary exposure to any unnecessary danger," there being no evidence that in attempting to rescue the crew he exposed himself to any more danger than was necessary in the undertaking.² In an action on an accident policy it appeared that after deceased had crossed the railroad track he met two men going toward it, who were slightly intoxicated, and warned them to look out for an approaching train. The men crossed the track, and passed on, deceased going in an opposite direction. Deceased must have afterward returned, for the engineer of the train, which was running about four miles an hour, testified that when he first saw him he was standing by the track, and that, when the engine was about twenty-five feet from the crossing, he stepped upon the track, and squatted down, so that he was struck by the engine and killed. It was held that the court should have dismissed the suit on the ground that the death of the deceased resulted from "voluntary exposure to unnecessary danger," within a clause of the policy precluding a recovery in such case, and a submission of the question to the jury on the theory that deceased was following the two men to save them from possible injury was unwarranted.³

§ 372. A policy contained, among others, the following clause: "This insurance does not cover disappearances, nor injuries of which there is no visible mark on body, nor accident, nor death or disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so en-

Donahoe v. Railway Co., 83 Mo. 560; ² Tucker v. Life Co., 4 N. Y. Supp. Beach, Contributory Negligence, p. 505; 50 Hun 50; 121 N. Y. 718; 24 N. 45, § 15; Wharton, Negligence, § 314; East. Rep. 1102.

Pierce, R. R. 329; Carroll v. Railroad ³ Williams v. Association, 133 N. Y. Co., 14 Minn. 57; Pennsylvania Co. 366; 31 N. East. Rep. 222; Finch and v. Roney, 89 Ind. 453; Cottrill v. Rail- Maynard, J.J., dissenting; reversing way Co., 47 Wis. 634; 3 N. W. Rep. 14 N. Y. Supp. 728.

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¹ Williams v. Ass'n, 14 N. Y. Supp.

728.

gaged or affected. * * "Voluntary exposure to unnecessary danger." The woman, from whose room deceased attempted to get away at the time he was killed, testified that he came to her room about half-past five o'clock in the evening; that a few minutes afterward policemen came to her room, hammered at the door with their clubs, and demanded admittance, which she refused; that deceased went into the hallway twice to get down by the stairs, then returned and prepared to go out of the front window; that he took a piece of selvage about six inches wide, which was lying on the floor, torn from bed-ticking cloth. He tried the strength of it over his knee, with both hands, and then under his foot, and said he knew it would hold him. He then tied it to the leg of a sewing machine sitting near the window, and, holding to the strip, started out of the window to let himself down to the brick sidewalk about fifteen feet below. Persons out in the street stated that they saw deceased come out of the window, and let himself down a foot or two, when the strip of bed-ticking broke, and he fell, striking his feet against an iron circle which projected from the store door beneath him. This turned him over, so that he struck the walk on his head, and received such injury as caused his death. The court said: "The bare statement of the manner in which deceased came to his death, brings it, we think, clearly within the clause of the policy of 'voluntary exposure to unnecessary danger,' and fully justified the trial court in taking the case from the jury, and directing them to find for appellee."¹

A policy provided that the insurance should not extend to injuries caused by certain acts of the insured, "or generally by his willfully exposing himself to any unnecessary danger or peril." The insured accosted a woman in the street, persisted in doing so in the face of remonstrances, was knocked down by the man in whose company she was at the time, and received injuries from which he died. Lord Coleridge said: "I can not bring my mind to think that any such thing was pointed at as a man either in his senses or out of his senses, either morally or immorally going up and speaking to a woman, and in the course of speaking to a woman getting knocked down

¹ *Shaffer v. Travelers' Ins. Co. (Ill.)*, 22 N. East. Rep. 581; S. C., 31 Ill. App. 112.

by somebody who thought he had a right to protect her. I can not think that is willful exposure to unnecessary danger or peril, coming after this proviso: 'by entering or leaving a carriage whilst a train is in motion, or otherwise by his acting in violation of a railway company's by-laws, or riding races or steeple-chases,' and so on. That is the conclusion I put upon it; and as to that point in the case I am strongly in favor of the plaintiff." Denman, J., said: "I am not prepared to go so far as to say that the rule of *cjusdem generis* would necessarily apply so as to exclude such a peril or such a danger as that to which it is alleged that the deceased man exposed himself in this case. As at present advised, and without expressing any very strong opinion about it, it appears to me that it was a matter with regard to which there was evidence for the jury."¹

§ 373. **External, violent and accidental means—External and material cause.**—When a contract insures against injuries or death caused by external, violent and accidental means, it is not sufficient that an injury or death was caused by any one of these means, but it must have been caused by all of them combined, to bring it within the contract. The burden is on the plaintiff to show a death or injury by such means.² Where an insured, in diving, after the manner of bathers in deep water, by a slight accidental turn of the body, brings his ear in contact with the water, so that it is ruptured, the injury is the result of violent external causes; but if he dives, meets with no interference or obstruction in entering or in moving under the water, has no unusual circumstance happen to him to occasion injury, but feels a pain in his ear when he comes out of the water, it can not be said that the pain comes from accidental causes.³ In a suit on an accident policy, where the death was alleged to have occurred by reason of the rupture of a blood vessel, sustained while exercising with Indian clubs, it was held that, if the deceased voluntarily took in his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his in-

¹ *Mair v. Assurance Co.*, 37 L. T. R. 127 U. S. 661; 17 Ins. L. J. 585; 8 (N. S.) 356. The case was reversed Sup. Ct. Rep. 1360.

on another point.

² *Rodey v. Ins. Co.*, 3 New Mexico

³ *Travelers' Ins. Co. v. McConkey*, 316; 9 Pac. Rep. 348.

tended and usual movements in such exercise, that is, if he voluntarily used them in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental, or involuntary movement of the body, and in such use of the clubs there occurred the rupture of a blood vessel and consequent injury, it could not then be said, that the means through which the injury was effected, were accidental; but, if while engaged in such exercise there occurred any unforeseen, accidental or involuntary movement of the body of the deceased, which in connection with the use of the clubs, brought about the injury, or if there occurred any unforeseen or any unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain or wrenching, by means of which the injury was occasioned, that would be an accident within the spirit of the policy, that is, the means by which the injury was affected would, in such case, be external, violent and accidental.¹

A policy provided that if the insured should sustain accidental bodily injuries through violent and external means, he should be paid a certain indemnity. He took a train to go to a certain depot to meet an acquaintance, but finding that he was probably mistaken as to the depot at which the meeting was to take place, jumped off the car, felt no shock, and ran and walked briskly to the other depot. Afterward, on the same day, he felt pain about one knee, called on a physician, who found a partially developed rupture on his right loin, and then for the first time referred his pain and injury to his jumping off the cars or running to the depot. In speaking of these facts it was said: "There was no accident, strictly speaking, in the means through which the bodily injury was effected. It would not help the matter to call the injury itself, that is, the rupture, an accident. That was the result and not the means through which it was effected. The jumping off the cars or the running was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling, or

¹ *McCarthy v. Ins. Co.*, 8 Bissell 362; 8 Ins. L. J. 298.

slipping, or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy or a hemorrhage, a rupture of a blood-vessel in the head, or the lungs. True, in jumping from the cars and running, there was more violence, or properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How, then, admitting the rupture to have been effected by jumping from the cars or by running to see if they were coming, can it be said that it was caused by accidental as well as violent means? * * The injury which he received was in no sense the result of accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground just as he intended to do. So in running. He ran from no peril or necessity, but for his own convenience, voluntarily, and from all that appears, without stumbling, slipping or falling. In both cases he accomplished just what he intended to do, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control. All that he claims is that, some hours after, it was discovered a muscle in the walls of the abdomen had given way under the strain to which he had voluntarily put it under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping, or running, or by both, does not help the matter unless we call running and jumping accidents. I, therefore, am of opinion that the alleged injury did not result from an accident, within the meaning of the contract.”¹ Where, by its terms, a policy is payable in case of death “received through external, violent and accidental means,” the intent is that the means, or that which caused the injury, should be external, and not that the injury must be external. Where the assured chokes to death while attempting to swallow a piece of beefsteak which accidentally lodges in his windpipe, death results from external, violent and accidental means and is within the terms of the policy.²

¹ Southard v. Assurance Co., 34 Conn. 574.

² American Accident Co. v. Reigart (Ky.), 23 S. W. Rep. 191.

§ 374. Some courts have dissented from the doctrine laid down in the cases just cited,¹ and have laid down a broader rule based upon the definition that an accident is an unusual and unexpected result of a usual act. A certificate insured a member against "bodily injuries effected through external, violent and accidental means." He jumped from a platform four or five feet high to the ground, soon afterward appeared ill, vomited, could retain nothing on his stomach, passed nothing but decomposed blood and mucus, and died nine days afterward. It appeared that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. It was held that the jury were at liberty to find that the injury resulted from an accident.² While an insured was pitching hay, the handle of his pitchfork slipped through his hands and strained him in such a manner that peritoneal inflammation was produced. Upon these facts the court said: "It is said, that if the assured strained himself while unloading hay, it was not an accident insured against within the meaning of the policy. Why not, if he *accidentally* strained himself, as is averred in the plaintiff's affidavit? Why is not death resulting from an accidental strain as much within the meaning of the policy as death produced by any other accidental cause? If the injury be accidental, and the result of it death, what matters it whether the injury is caused by a strain or blow? * * And there is no more reason for regarding an injury of the abdominal muscles, caused by an unexpected blow, an accident than an injury caused by a casual and unlooked-for strain. If the death of the assured resulted from an accidental strain, then it was not 'caused by natural disease.' And if it resulted from any accidental strain, it does not follow that it was caused by 'unreasonable imprudence.'"³

Where a policy excepts injuries caused by "lifting or over-exertion" by the assured, the lifting or over-exertion must be a voluntary and unnecessary act, and the effort to lift, or over-exertion put forth in an emergency of danger, is not within

¹ Rodey v. Ins. Co., *supra*; McCarthy v. Ins. Co., *supra*; Southard v. Assurance Co., *supra*. Burroughs, 69 Pa. St. 43, and dissenting from Southard v. Assurance Co., *supra*.

² U. S. Association v. Barry, 131 U. S. 100; citing Martin v. Ins. Co., 1 Foster & Fin. 505; N. A. Ins. Co. v. ³ N. Am. L. & Acc. Ins. Co. v. Burroughs, 69 Pa. St. 43.

the exception. A policy insured against death resulting from "bodily injuries effected through external, violent and accidental means," but stipulated that no claim should be made where the death had been caused by lifting, or by over-exertion. The insured was a bridge builder, and the evidence tended to show that while raising the bents of a bridge, the foot of one of the posts slipped, and an unexpected weight was thrown upon the pike-poles in the hands of the men, and that the insured was either struck by the end of his pole, or subjected to a strain of great severity, and that he was at once disabled and soon afterward died. It was held that his death was effected through external, violent and accidental means, within the meaning and intent of the contract of insurance, and that an effort to lift or an over-exertion put forth in an emergency of danger as, for instance, in the effort to save one's self from being crushed by a descending weight, was not within the exception of the policy.¹ A policy of insurance extended to any bodily injury arising from any accident or violence, "provided that the injury should be occasioned by any external or material cause operating on the person of the insured." The company was held liable for an injury to the spine of the insured, caused by lifting a heavy burden in the course of his business.² While an insured was driving upon a public street, his horse became frightened at an unsightly object, ran away without upsetting the carriage or coming in contact with anything, and was at length brought under control. He and his children were apparently greatly endangered at the time, and he suffered so severely, either from fright or strain caused by his physical exertion in restraining the horse, that he died within an hour after the accident. The court held that his death ensued from bodily injuries effected through external, violent and accidental means.³

It has been held that death by the taking of poison is not effected through such means, within the meaning of a policy, for, though the action of the poison may be violently destructive to life, it can not fairly be said that there is any violence

¹ Reynolds v. Accident Association,
1 N. Y. Sup. 738.

² McGlinchey v. Fidelity and Casualty Co., 80 Me. 251; 14 Atl. Rep.

³ Martin v. Ins. Co., 1 Foster & 13.
Fin. 505.

in the act of taking a dose of poison.¹ But the reasoning upon which this rule is founded has been declared to be too refined and technical to have been in the minds of the parties to the contract, and the rule itself has been disapproved as too strict, and as against the principles governing the construction of insurance policies.²

§ 375. An insured who was subject to epileptic fits, was found dead in a plunge bath in almost a standing position. There was an abrasion between his eyes, and a bruise on one side of his head. His physician testified that, on account of his peculiar condition of health at the time, his hot bath probably brought on an epileptic attack, and that the blows which caused the abrasion and bruise were not sufficient to have caused his death. It was held upon this evidence that the deceased came to his death through other causes than "external, violent and accidental means," within the meaning of his policy. The court said: "When it is considered that the evidence shows that the abrasion and bruise were but slight, and that deceased, when found, was in almost a standing position, with his right hand firmly grasping the supply-pipe, it is impossible to believe that his death was caused by a fall or a blow. In view of all the facts and circumstances of the case, considering the condition of the deceased at the time of and just previous to his death, the probable effect of the heat of the bath upon one in his condition, his position when found, and the condition of his body after death, it seems to me to be clear that he came to his death through other causes than 'external, violent and accidental means, within the intent and meaning' of the policy in suit, and I must so find."³

A mariner, about to sail on a voyage, was insured "in the event of his sustaining any personal injury during said intended voy-

¹ Pollock v. Accident Association, 102 Pa. St. 230; Bayless v. Ins. Co., 14 Blatchford 143; Hill v. Ins. Co., 22 Hun 187, Follett, J., dissenting. But the case of Hill v. Ins. Co., *supra*, was disapproved on this point in Paul v. Ins. Co., 45 Hun 313, and the opinion of Follett, J., was commended as declaring the true and more liberal rule. See also Paul v. Ins. Co., 112 N. Y. 472; 20 N. East. Rep. 347. ² Paul v. Ins. Co., 112 N. Y. 472; 20 N. East. Rep. 347; affirming 45 Hun 313, and overruling Hill v. Ins. Co., 22 Hun 187; Healey v. Association, 133 Ill. 556; 25 N. East. Rep. 52; McGlinchey v. Casualty Co., 80 Me. 251; 14 Atl. Rep. 13; Pickett v. Ins. Co., 144 Pa. St. 79; 22 Atl. Rep. 871; § 393. ³ Tennant v. Ins. Co., 31 Fed. Rep. 322.

age, from or by reason or in consequence of any accident whatsoever." He sailed to India, and, while on board his ship, was sunstruck and died. The court held that the company was not liable, and said: "The disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred ('cold, damp, the vicissitudes of climate or atmospheric influences') are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected and so died. We think, for the reasons we have given, that his death must be considered as having arisen from a 'natural cause' and not from 'accident,' within the meaning of this policy."¹

In an action on an accident policy, it was shown that deceased had had a fall, of the effects of which he complained for several days, and then fell sick. From this sickness he never recovered and throughout its continuance he complained of the hurt, and bore a bruise. His attending physicians testified that he died of typhoid fever, and that this disease was never produced by a bruise. His nurse, a competent one, of long experience, testified that he did not have typhoid fever,

¹ *Sinclair v. Ins. Co.*, 107 Eng. Com. L. Repts.; 3 El. & El. 476; *Dozier v. Casualty Co.*, 46 Fed. Rep. 446. Of death by freezing it was said by a learned writer in 7 Am. Law. Rev. on pg. 592: "That freezing is an accident, where it occurs without want of due care and needless exposure by the insured, would seem to follow from the analogy of drowning, or of suffocation by gases in a coal mine or carbonic acid in a chamber. The effect of exposure to the heat of the sun is hardly analogous. Sunstroke is a specific disease, and is as positive an affection of the brain as apoplexy or paralysis. *Sinclair's case* and the *dicta* therein, do not apply to death from atmospheric causes where no specific disease is produced; and the argument that death in *Dr. Bean's* case (freezing to death on Mount Blanc) was not an injury of which there was any external and visible sign, is answered by denying the fact. The frozen body was itself a visible sign of the injury. Frost in the corporeal tissues and ice in the arteries are as visible signs of injury as extravasated blood around the spot where a blow is struck. We have no doubt how this point will be decided whenever it receives adjudication."

and it was admitted that bruises might produce other forms of fever. It was held that the evidence was sufficient to support a verdict that the death of deceased was the result of accident.¹

§ 376. In *Ripley v. Assurance Co.*² the opinion was expressed that a person waylaid and killed by robbers had died from violent and accidental means. "Perhaps, in a strict sense," said the court, "any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accidental. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning, for the event took place unexpectedly and without design on Ripley's part. It was to him a casualty, and, in the more popular and common acceptation of the word, 'accident,' if not in its precise meaning, includes *any event which takes place without the foresight or expectation of the person acted upon or affected by the event.* A man goes to a livery for a horse and carriage, and is given one. But the horse is sure to run away if he is driven. This the liveryman knows, the hirer does not. The horse is taken, driven, and runs away, injuring the hirer. Now the event was foreseen and expected by the owner of the horse, but unforeseen and unexpected to the hirer, and, therefore, it seems to me it was accidental to him, and within view of this policy would be regarded an accident. A man throws a train of cars off the track, and one or more passengers are injured or killed. To those in the cars it is an accident, a casualty, while in the exact sense murder is not an accident. I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well know, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unex-

¹ *Standard Life v. Thomas* (Ky.). Pac. Rep. 383; *Railroad Co. v. Sutton*, 42 Ill. 438; *State v. Davidson*, 30 Vt. 377.

of the assured made to his physician while treating him, see *Equitable Mutual v. McCluskey*, 1 Colo. 473; 29

² 2 Big. L. & Acc. Cases, 738; 1 Dillon 403.

pectedly, is by them called accident. The company fix the terms of this contract, and are to be held, in the absence of plain and unequivocal exceptions and provisos, to intend what, in popular acceptance, the insured party is likely to understand by its terms. The question is not, perhaps, entirely free from doubt. I find no case in which the exact point has been decided." ¹ The word "accident" in an insurance policy will be given its ordinary and usual signification, as being an event which takes place without one's foresight or expectation, and it may include an injury received by one in a common law affray, where no fault on his part is shown.²

In *Hutcherstaff's Ex'r v. Travelers' Ins. Co.*,³ it was said: "Accidents are of two kinds; first, those that befall a person without any human agency, as the killing of a person by lightning. Here the elemental properties of lightning and its flash are not caused or contracted by human agency, but the fact that the person was struck by unintentionally placing himself within its range is, as to him, an accident; second, those that are the result of human agency. The latter are divided as follows: First, that which happens to a person by his own agency, as if he is walking or running and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was, therefore, accidental. Second, that which befalls a person by the agency of another person without the concurrence of the latter's will, as where one standing on a scaffold unintentionally lets a brick fall from his hand and it strikes a person below. Here the dropping of the brick, as it was not intended by the former and was unforeseen by the latter, is, in the broadest sense, an accident. Third, that which a person intentionally does, whereby another is unintentionally injured, as, where one intentionally fires a gun in the air and accidentally shoots another person. Here the act of firing the gun was intentional but the shooting of the person was unintentional; therefore, on

¹ On appeal the case was decided on another point. See *Ripley v. Assurance Co.*, 16 Wall. 336; 2 Ins. L. J. 538.

² *Supreme Council v. Garrigus*, 104 Ind. 133. "It will not do to say,"

said the court, "that because a desperado waylays, assaults and wounds a member intentionally, that wounding is not an accident to the member, within the laws, etc., of the order."

³ 87 Ky. 301.

the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional, but, as to the person shot, it was by purely accidental means. Fourth, so, also, as we think, if one person intentionally injures another, which was not the result of a re-encounter or the misconduct of the latter, but was unforeseen by him, such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is as to him accidental, although inflicted intentionally by the other party. It is conceded that in the three instances first named the injury would be by 'accidental means.' Nor, doubtless, will it be denied that if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whatever might be on board, whereby one or more persons were shot or mashed, that the casualty befalling these persons, as far as they were concerned, would fall within the term of accidental means. In other words, we do not regard it as essential, in order to make out a case of injury by accidental means so far as the injured party is concerned, that the party injuring him should not have meant to do so, for, if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen—a casualty—it seems clear that the fact that the deed was willfully directed against him, would not militate against the proposition, that, as to him, the injury was brought on by 'accidental means.' "

§ 377. Under a policy stipulating that it only covers injuries effected by external, violent, and accidental means, an injury not anticipated, nor naturally to be expected by the assured, though intentionally inflicted by another, is an accidental means, within the meaning of the contract, where it does not in terms provide against a recovery if the death was caused by injury intentionally inflicted by the assured or any other person.¹ Where the insured is found dead with a pistol

¹ Accident Ins. Co. v. Bennett, 90 Rep. 1360; Hutchcraft's Ex'r v. Ins. Tenn. 256; 16 S. W. Rep. 723; dis- Co., 87 Ky. 300; 8 S. W. Rep. 570; tinguishing Travelers' Ins. Co. v. see Warner v. U. S. Association McConkey, 127 U. S. 661; 8 Sup. Ct. (Utah), 32 Pac. Rep. 696.

bullet through his heart, it may not be presumed from the mere fact of the death that he was murdered, but such inferences and conclusions as to the cause of his death may be drawn as the facts and circumstances will justify.¹ In an action on an accident policy, testimony of physicians that the assured bore on his back marks of extreme violence, apparently recently inflicted, and that his injuries produced his death, is *prima facie* evidence of death resulting from bodily injuries, "through external, violent, and accidental means." Unless such injuries were intentionally self-inflicted, or intentionally inflicted by some other person, the legal presumption is that they were accidental. No presumption can be indulged that the law has been violated, as it would have been were the injuries inflicted by another.² There may be a *prima facie* case of accidental death, but the burden of proving accidental death is on the plaintiff.³ Where it appears that a violent death was either the result of accidental injuries or of a suicidal act of the deceased, the presumption of law is against the latter.⁴

§ 378. In *Scheiderer v. Ins. Co.*,⁵ it was alleged in the pleading that while the insured, who was traveling in a railway car, "*was in a dozed and unconscious condition of mind, and not knowing or realizing what he was doing, [he] involuntarily arose from his seat, and walked unconsciously to the platform of the car, and fell therefrom to the ground;*" and it was held that this constituted a good cause of action upon a policy of accident insurance. In commenting upon this case, Dyer, J., said: ⁶

"Since the moving cause was the *involuntary act* of leaving

¹ *Travelers' Ins. Co. v. McConkey*, Rep. 388; *Knickerbocker Ins. Co. v. Jordan*, 7 Cin. Law Bull. 71; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661.

² *Cronkhite v. Ins. Co.*, 75 Wis. 116; 43 N. W. Rep. 731.

³ *Merrett v. Accident Association*, 98 Mich. 338.

⁴ *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272; *Washburn v. Society*, 10 N. Y. Supp. 366; *Whitlach v. Co.*, 28 N. Y. Supp. 951; *Wright v. Ins. Co.*, 29 Up. Can. C. P. 221; *Mallory v. Ins. Co.*, 47 N. Y. 52; *Leman v. Ins. Co. (La.)*, 15 So.

Rep. 388; *Knickerbocker Ins. Co. v. Jordan*, 7 Cin. Law Bull. 71; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; 17 Ins. L. J. 585; 8 Sup. Ct. Rep. 1360; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116; 43 N. W. Rep. 731; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; 16 S. W. Rep. 723.

⁵ 58 Wis. 14; 16 N. W. Rep. 47; 46 Am. Rep. 618.

⁶ *Crandall v. Ins. Co.*, 27 Fed. Rep.

the seat and walking to the platform, the case suggests the inquiry, if for example, a person in a fit of somnambulism, or in delirium, *not knowing or realizing what he is doing*, involuntarily inflicts injury upon himself—that is by means of his own hand, and death ensues, is not such an injury as much the result of accident as if in the same circumstances, the injury results from other external forces, such as falling from the platform of a moving train?" As an answer to this question the learned judge held in this case that death from hanging, when the insured was insane, was a death effected through external, accidental and violent means, within the meaning of a policy of accident insurance; and on appeal this decision was affirmed.¹

§ 379. **External and visible sign.**—A clause providing that the insurance "does not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured," does not apply to fatal injuries, but only to those not resulting in death. It would be unjust to hold that this condition applied in cases of death, for it would preclude recovery in all instances where death occurred by drowning, freezing, poisoning, suffocation—means of death leaving no outward mark—and also where the insured has been killed and his body is missing. And where this clause is followed by another, providing, "nor to any death caused" in certain named ways, the context shows that the first clause is only applicable to injuries not resulting in death. There are reasons for the condition applying to a surviving claimant. He has an opportunity for feigning an internal injury if disposed to defraud the insurers, but no such protection is required where the accident causes death. The dead body is an external and visible sign that an injury was received, when death

¹ Accident Ins. Co. v. Crandal, 120 U. S. 527; 7 Sup. Ct. Rep. 685; see enhauer v. Ins. Co., 7 Heisk. 567; 19 U. S. 527; 7 Sup. Ct. Rep. 685; see Am. Rep. 623; Moore v. Ins. Co., 1 Am. L. T. Rep. (N. S.) 319; Hartman v. Ins. Co., 21 Pa. St. 466; Phillips v. Ins. Co., 74 Mich. 592; Mutual Life v. Terry, 82 U. S. (15 Wall.) Rep. 549; Van Zandt v. Ins. Co., 55 U. S. 580; Bigelow v. Ins. Co., 93 U. S. 284; N. Y. 169; 14 Am. Rep. 215; Nimick Manhattan Ins. Co. v. Broughton, v. Ins. Co., 3 Pittsburg (Pa.), 293; 109 U. S. 121; Equitable Life v. Paterson, 41 Ga. 338; Breasted v. Trust Co., 4 Hill 74; 8 N. Y. 299; Eastbrook v. Ins. Co., 54 Me. 224; Phad- 70 Mo. 27; 35 Am. Rep. 410; Chap.

follows an accident.¹ While an insured was driving, his horse became frightened, ran away without upsetting the carriage or colliding with anything, and was at length brought under control. He was in great danger at the time, and suffered so severely, either from fright or strain caused by his physical exertion in restraining the horse, that he died within an hour. It was held that the company was liable, though there was no external and visible sign of injury upon the body of the insured.² While chopping wood in a place made slippery by the sleet and hail which had fallen, the insured slipped, fell across a log and immediately expired. There was no visible mark upon his body, but the company was held liable.³

Under such a clause in a policy, there must be an external and visible sign of the injury, but it does not necessarily follow that the injury must be external. Visible signs of injury, within its meaning, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences which are visible signs of internal injury. If an internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting and retching, or bloody or unnatural discharges from the bowels; if it sends forth to the observation of the eye, in the struggle of nature, any sign of the injury, these are external and visible signs, provided they are the direct result of the injury.⁴ Where the insured was found dead in bed, with a ball of tough froth over his mouth, slightly tinged with blood, and some red splashes on the side of his face and on his breast, the room being full of coal gas, it was held to be a question to be decided by the jury, under the evidence, whether these were the visible and external signs of injury.⁵ A nosebleed may be a visible external sign of an injury, and a bloody discharge from the

man v. Ins. Co., 6 Biss. 238; Cooper v. Ins. Co., 102 Mass. 227; 3 Am. Rep. 451; Jacobs v. Ins. Co., 1 McArthur (D. C.) 632; Dean v. Ins. Co., 4 Allen 96.

¹ McGlinchy v. Fidelity & Casualty Co., 80 Me. 251; 14 Atl. Rep. 13; Paul v. Ins. Co., 45 Hun 313; affirmed 112 N. Y. 472; 20 N. East. Rep. 347; Malory v. Ins. Co., 47 N. Y. 52; Eggen-

berger v. Association, 41 Fed. Rep. 172.

² McGlinchy v. Casualty Co., *supra*.

³ Eggenberger v. Association, 41 Fed. 172.

⁴ Barry v. Accident Ass'n, 23 Fed. Rep. 712.

⁵ U. S. Acc. Ass'n v. Newman, 84 Va. 52; 3 S. E. Rep. 805; see § 394.

bowels, even two or three weeks after an injury, may be its direct and visible result. Complaint of pain or soreness is not, however, such a sign.¹ In an action on an accident policy which provided that the insurance should not extend "to injuries of which there should be no visible mark on the body of the insured," where the answer admitted the death of deceased from erysipelas ensuing upon the accidental cutting and laceration of one of his fingers, the subsequent allegation that "there was no visible mark of said alleged accidental injury upon the body of plaintiff's testator" is repugnant to the admission, and the defense is not well pleaded.² Where it is provided that the insurance shall not cover injuries of which there is no visible external mark upon the body of the insured, and his injury is a strain, which was not externally visible until shortly after the accident, he is entitled to recover. Such a clause does not require that the effects of the accident shall be immediately visible, or that there must be broken limbs, or bruises, contusions, or lacerations on the body.³ An injury may not be visible to the eye, and still have an external or visible sign. A strain of the recti muscles which can be ascertained by a physician through the sense of feeling by applying his hands upon the exterior of the body may be said to be "visible," within the meaning of an accident policy, since it is noticeable and apparent to the touch.⁴

§ 380.—**The nature, cause or manner of death unknown, or incapable of direct and positive proof—Burden of proof.**—Where the evidence in a case is sufficient within the rules of law to prove that the death of the insured was the result of external, violent and accidental means, the language of the policy requiring the evidence to be "direct and affirmative" on the subject can not be construed to take the case out of the ordinary rules of evidence.⁵ Circumstantial evidence is regarded by the law as competent to prove any given fact,

¹ Whitehouse v. Ins. Co., 7 Ins. L. J. 23; U. S. Association v. Barry, 131 U. S. 100.

² Bernays v. United States Mut. Acc. Ass'n, 45 Fed. Rep. 455.

³ Pennington v. Ins. Co., 85 Iowa 468; 52 N. W. Rep. 482.

⁴ Gale v. Association, 21 N. Y. Supp. 893.

⁵ Reynolds v. Accident Association, 1 N. Y. Supp. 738; 17 N. Y. St. Repr. 337; Utter v. Ins. Co., 65 Mich. 545; 32 N. W. Rep. 812; 16 Ins. L. J. 532; see section 388; Badenfeld v. Ass'n, 154 Mass. 77; 27 N. East. Rep. 769; Richards v. Ins. Co., 89 Cal. 170; 26 Pac. Rep. 762.

and sometimes it is as cogent and irresistible as direct and positive testimony. Such a requirement of a policy as to direct and positive proof does not make it necessary that the plaintiff shall establish the fact and attendant circumstances of the decedent's injury by persons who were actually present when the injury occurred. The fact that the injury was caused by external violence may be directly and positively established by the proof given of the nature and character of the injury, and the presumption is that an injury was caused by accidental means rather than that it was the result of design, either on the part of the decedent or of any other person.¹ Under a policy stipulating that the insurance should not extend to any case of death, the nature, cause, and manner of which is unknown, or incapable of direct and positive proof, it is not necessary to establish the fact and circumstances of death by witnesses actually present, but these may be inferred from the circumstances, and it is not error to charge that the jury may find any fact proved which may rightfully and reasonably be inferred from the evidence.²

A policy provided: "This insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown, or incapable of direct and positive proof." The insured was found dead in a cattle-guard on a railway, having been run over by a passing train. The cattle-guard was at the end of a platform of the railway station, where the deceased might have fallen into it accidentally, but there was no evidence as to the circumstances of his death. The court said: "We think it would be a perversion of the true meaning of this clause to hold that, where the immediate cause of death is indisputable and evidenced by outward violence caused by a train running over the body, and an accident *prima facie* within the direct

¹Cronkhite v. Travelers' Ins. Co., 89 Cal. 170; 26 Pac. Rep. 762; Badenfeld v. Ass'n, *supra*.
²Accident Ins. Co. v. Bennett, 90 Tenn. 256; 16 S. W. Rep. 723; Eggenberger v. Association, 41 Fed. Rep. 172; Tennant v. Ins. Co., 31 Fed. Rep. 322; Travelers' Ins. Co. v. Shepard, 85 Ga. 751; 12 S. E. Rep. 18.
 75 Wis. 75; 43 N. W. Rep. 731; Travelers' Ins. Co. v. McConkey, 127 U. S. 661; 8 Sup. Ct. Rep. 1360; 17 Ins. L. J. 585; Mallory v. Ins. Co., 47 N. Y. 52; Peck v. Accident Association, 52 Hun 255; 5 N. Y. Supp. 215; Freeman v. Ins. Co., 144 Mass. 572; 12 N. East. Rep. 372; Richards v. Ins. Co.,

meaning of the insurance, it can be any objection that no human eye witnessed the precise manner in which the deceased fell into or got into the cattle-guard. A large proportion of accidental deaths occur under such circumstances that evidence is wanting as to the precise manner in which the deceased met his fate. Where the visible injuries plainly account for death, it can hardly be necessary to explain step by step how it happened."¹ Insured was found on a railroad track in a situation which showed that he had been killed by a certain train. There was evidence that before the arrival of that train he was waiting in the train-house for a train which passed fifteen minutes later on a track west of that on which he was found. There was no evidence of the cause of his fall on the track, or of his proximate acts. There was evidence that the platform east of the track on which he was run over was for trainmen only, and that the place intended for and generally used by passengers taking or leaving cars on that track was between that track and the one to the west. It was held that the court properly refused to instruct that if deceased, while on the east platform, or while getting off a car in motion, fell on the track, there could be no recovery of the insurance, there being no evidence upon which to base such instructions.²

¹ Wright v. Ins. Co., 29 Up. Can. C. P. 221; Trew v. Assurance Co., 6 H. & N. 839; Fitton v. Ins. Co., 17 C. B. N. S. 122; Mallory v. Ins. Co., 47 N. Y. 52; Knickerbocker Ins. Co. v. Jordan, 7 Cin. L. Bull. 71; Badenfeld v. Ass'n, *supra*; Peck v. Association, 52 Hun 255; 5 N. Y. Supp. 215; Accident Ins. Co. v. Bennett, 90 Tenn. 256; 16 S. W. Rep. 723.

² Badenfeld v. Association, 154 Mass. 77; 27 N. East. Rep. 769. The court said: "The defendant asked for instructions upon the hypothesis that deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but, if it could be inferred, it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presumption that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it was in motion, under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent. It may be said, in general, in regard to each of the defendant's prayers for rulings and instructions, that there is no evidence of the act of the deceased proximate to his injury, and, of course, no evidence of the circumstances which characterize the act as negligent or otherwise. If the jury infer an act, they are not, without evidence, at liberty to infer the circumstances which made the act negligent. The jury could not properly found their verdict upon particular facts found without evidence. The

§ 381. An insured was in his usual health until one night when he got up from his bed and went down stairs. When he came back he said he had fallen down the back stairs, hit and hurt the back of his head and almost killed himself. He complained greatly of his head, appeared faint, and vomited. He grew worse and died in four days. No one saw or heard him fall down stairs. The company was sued on the ground that his death was caused by his accidental fall, and the only evidence on that point at the trial was the testimony of his wife and son as to the declarations made by him when he came back to his room. The court held that these declarations were competent evidence of an accident from external, violent and accidental means.¹ While the burden is upon the plaintiff to show that death was caused by external, violent and accidental means, he need not negative the limitations and conditions of the policy, which provide that it does not cover disappearance, intentional injuries, and the large number of specified injuries, or death from the variety of causes named in it.² And the burden is on the company to show that the insured did not use due diligence for his personal safety.³ A policy contained this condition: "Provided, always, that no claim shall be made under this policy by the said insured in respect of any injury, unless the same shall be caused by some outward or visible means, of which proof satisfactory can be furnished." The language does not require that proofs of the cause of the injury shall be made and presented to the company as an act precedent to a right to recover. The injury must be caused by some outward or visible means, of which proof "can be furnished," but the language does not import that such proof must be made before there is a right of re-

real question was whether the facts *supra*; Hall v. Am. Acc. Association, directly proved by the evidence and 86 Wis. 518; 57 N. W. Rep. 366.
those inferred from them sustained ² Travelers' Ins. Co. v. McConkey, the burden of proof, which was upon 127 U. S. 661; 17 Ins. L. J. 585; Coburn v. Travelers' Ins. Co., 145 Mass. 226; a question for the jury, and not for 13 N. East. Rep. 607; 17 Ins. L. J. 40; the court, unless the court could rule Cronkhite v. Travelers' Ins. Co., 75 that there was not sufficient evidence, Wis. 116; 43 N. W. Rep. 731.

³ Badenfeld v. Ass'n. 154 Mass. 77; ¹ Travelers' Ins. Co. v. Mosley, 75 27 N. East. Rep. 769; Freeman v. Ins. U. S. (8 Wall.) 397; Clifford, J., dis- Co., 144 Mass. 572; 16 Ins. L. J. 822; senting; see Richards v. Ins. Co., 36 Alb. L. J. 127; 12 N. East. 372.

covery. The terms of a policy may make it a condition precedent to the right to recover the stipulated amount that proof of the happening of the accident and the causes of the injury shall be furnished to the company, but there is no rule of law requiring such proof as an act precedent to such right.¹ By satisfactory proof of accidental death or injury is meant such proof as shall appear satisfactory to a court, according to the rules of evidence, and not such as shall be satisfactory to the company.²

¹ *Railway Assurance Co. v. Bur-* *v. Garden*, 101 N. Y. 387; 4 N. East. well, 44 Ind. 460; 3 Ins. L. J. 281. Rep. 749; *Miesell v. Ins. Co.*, 76 N. Y.

² *Dennis v. Ben. Ass'n*, 126 N. Y. 115, 496; 4 N. East. Rep. 843; *Boiler Co.*

CHAPTER XXVIII.

ACCIDENT INSURANCE.

- § 382-385. Accidents while traveling by public or private conveyance.
386. While traveling in compliance with all rules and regulations of common carriers; violation of rules of employment.
387. Walking on railway track.
388. Intentional injuries inflicted by the insured or any other person.
389, 390. Intoxication: under the influence of liquor.
391. Fits, vertigo, fainting.
392. Drowning.

§ 382. **Accidents while traveling by public or private conveyance.**—Where a contract of accident insurance stipulates that the insured shall not be wanting in diligence for his self-protection, shall not expose himself to unnecessary danger, or obvious risk, or shall not contribute to an injury by his own negligence, the liability of the insurer for an accident to the insured, and his own acts in relation to the cause of the injury, are to be measured much as if the rights of the parties depended, not upon contract, but upon the tortious injury of one through the negligence of the other.¹ The decisions in the books on questions of negligence and contributory negligence are, therefore, often in point in such cases, though of course, the doctrines of willful negligence and comparative negligence do not apply. A traveler might, under these last named doctrines, have a good cause of action for an injury against the common carrier transporting him, while an accident insurance company would not be liable to him under such a contract for the same injury, but an insurance company can never be liable for an accidental injury to a traveler holding such a contract of insurance, where the common carrier would be exempt from liability on account of his contributory negligence. If any injury happen to an insured traveler while he is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care on his part. But when it is shown

¹ See § 367.

that he had left the place assigned for passengers, and was occupying an exposed position, the company is not liable, unless it is also made to appear, upon some ground of necessity, that his position was consistent with the exercise of proper care and caution.¹

Bringing a train to a full stop near the regular station, after having given the usual signal indicating the arrival at the station, is an implied invitation from the company to the passenger to alight; and a passenger is not necessarily guilty of contributory negligence, who, without knowledge of the dangerous place at which a train has stopped, and in a dark night, steps from a train which has been brought to a full stop, near the usual stopping place, at the regular time for stopping, after the customary signal indicating the arrival at the station.² If a person insured while traveling by public or private conveyance, having a right to leave a train at a station, is informed or notified in any way that the train is about to start, and an opportunity is thus given to him to take his place again upon the train, but he chooses to remain until the train is put in motion and is then injured in getting on the train, it may be said that he is negligent, in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station, he has no notice by bell, whistle or otherwise, of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and, intending to go farther he attempts to get on the train and is injured, there is not the same measure of responsibility upon him. It would be natural for a man—for a prudent man—intending to go farther on the train to make an effort, even when the train was in motion, to regain his place on the train.³ The insured took a train and went to Kankakee. The practice was for the train to stop at the station, and then pass on to the coal-bin, provided the entire train was to go beyond Kankakee. The train stopped at the station and sev-

¹Hickey v. R. R. Co., 14 Allen 429. road Co. v. Aspell, 11 Harris 147;

²McLean v. Burbank, 11 Minn. Terre Haute, etc., R. R. Co. v. Buck, 277, 288; Maury v. Talmadge, 2 Mc- 96 Ind. 346; Burkhard v. Ins. Co., 102

Lean 157; Laing v. Colder, 8 Pa. St. Pa. St. 262; 48 Am. Rep. 205. 479; Stokes v. Saltonstall, 13 Peters ³Tooley v. Assurance Co., 3 Biss. 192; Montgomery, etc. R. R. Co. v. 399; 2 Ins. Law J. 275; Schneider v. Boring, 51 Ga. 582; Pennsylvania R. Ins. Co., 24 Wis. 28.

R. Co. v. White, 88 Pa. St. 327; Rail-

eral persons left the cars, the insured among others. The train remained at the station several minutes and took in water. The bell was rung, the conductor signaled with his light, and the train went on to take in coal. There was a platform extending from the station along the side of the railroad track toward the water-tank and coal-bin. When the train moved, the insured, who was standing by a door of a station, started forward on the platform to overtake the train. When he reached the train, he extended his hands to grasp the car rails, fell between the two passenger cars, and was run over and instantly killed. There was evidence tending to show that his journey ended at Kankakee, but evidence to the contrary was also shown. A clause in his policy limited the liability of the company to an accident received by the defendant "while actually traveling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers." The court said: "Tooley must have actually been a traveler in or upon the train; but it can not be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a meaning to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train, as a traveler upon it. * It is a question of fact to be determined by the jury—was Tooley at the time the injury was received by him, a traveler on the train? And this will depend upon the fact whether his journey terminated at Kankakee.

It is claimed on the part of the defense that that was the termination of his journey, and, if so, then he was not a traveler on this train at the time of the accident. * * According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee, on the train, he had the right to leave the car at Kankakee and return to it; he was not bound to remain *inside* the car all the time."¹

¹Tooley v. Assurance Co., *supra*.

§ 383. A policy insuring "against any accident while traveling by public or private conveyances for transportation of passengers," covers an accident occurring while the insured was attempting to enter a public conveyance for passengers while in motion.¹ But where such a policy provides that the company shall not be liable for an injury incurred in consequence of the negligence of the insured, it has been held that the company will not be liable if the insured is injured in attempting to get off or on a conveyance while in motion, whether the motion is rapid or slow;² but it has also been held, under such a provision of the policy, that the test of liability is whether the insured, in attempting to get upon a conveyance while in motion, used that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed—or in other words, it has been held that the question whether the insured acted prudently, reasonably and diligently, under the circumstances of the case, is one for the jury to determine under the evidence.³ Under the provisions of a policy insuring the holder against accidents while traveling on the conveyances of any common carrier, provided he complied with the rules and regulations of such carrier and exercised due diligence for self-protection, it was held that a passenger on a railway car, who was injured by being thrown from the steps of the car, where he was standing while the train approached a station, in violation of a known rule of the company, was not entitled to recover.⁴ A contract of accident insurance provided: "Standing, being or riding upon the platform of moving railway coaches, * * or entering or attempting to enter or leave any public conveyance using steam as a motive power while the same is in motion, * * are hazards not contemplated or covered by this certificate, and no sum shall be paid," etc. This exception, however, was not made to apply to the exposure of railway employes in the performance of their duty. The

¹ Champlin v. Assurance Company, Hickey v. R. R. Co., 14 Allen 429; 6 Lans. 71; see § 365 *et seq.* Damount v. R. R. Co., 9 La. Ann.

² See § 365; Sawtelle v. Assurance 441. Co., 15 Blatch. 216; see § 367; Hull v. ³ Tooley v. Assurance Co., 3 Biss. Association, 41 Minn. 231; 42 N. W. 399, 403.

Rep. 936; Miller v. Travelers' Ins. Co., ⁴ Bon v. Assurance Co., 56 Iowa 39 Minn. 548; 40 N. W. Rep. 839; 664.

assured, a shop hand of a railway company, while being carried homeward from the shops at the close of the day's work, upon one of the company's trains, went out upon the platform while the train was in motion, intending to get off when it should stop, for the purpose of crossing over by a switch to another track. This was done wholly for his own convenience and purpose, and was not prompted by any sudden emergency or necessity. He was thrown off the platform, and killed. The case was held to be within the specific exceptions in the contract, and the insurer was not liable.¹ It can not be said that a passenger on a railroad train, who goes out upon the platform of the car while the train is in motion, because he is overcome by the heat of the car, or is suffering from nausea, voluntarily exposes himself to unnecessary danger, within the meaning of a policy of accident insurance.²

§ 384. A policy insured the holder against any accident happening to him "from railway accident whilst traveling in any class carriage on any line of railway," etc. The assured traveled in a railway carriage to a certain place. In getting off of it after the train had stopped, on a rainy morning, without any negligence on his part, his foot slipped from the step, and he sustained an injury. This was held to be a railway accident whilst traveling, within the meaning of the policy. Pollock, C. B., said: "The first question is, whether this is a railway accident, within the meaning of the policy. We are of opinion that it is. * * It is quite plain that the plaintiff was a traveler on the railway; it is quite plain that though at the time of the accident his journey had in one sense terminated by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act which, as a passenger, he must necessarily have done, for a passenger must get into the carriage, and get out of it when the journey is at an end, and can not be considered as disconnected with the machinery of motion until the time he has, as it were, safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act imme-

¹ Hull v. Accident Association, 41 Minn. 231; 42 N. W. Rep. 936.

² Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321.

diately connected with his being such passenger. Under these circumstances we think this was a railway accident within the meaning of the policy." Anderson, B., said: "As to railway accidents, my notion of a railway accident is an accident occurring in the course of traveling and arising out of the fact of the journey. It does not necessarily depend on an accident to the railway or machinery connected with it."¹

Where a policy insured "against any accident while traveling by public or private conveyances for transportation of passengers," and the insured was injured in attempting to get into an omnibus on a public street, the supreme court of New York said: "Was the plaintiff traveling when the accident happened? He was in the act of getting into a public conveyance for that purpose, and was injured while upon the outside step thereof. It would be a very strained construction of a contract like this to hold that he was not traveling. If he was not traveling it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was traveling."²

An insurance was procured against "any accident while traveling by public or private conveyances provided for transportation of passengers." An accident occurred to the insured while she was going on foot over the customary route from a steamboat-wharf, where conveyances were to be had for hire, to a railway station about seventy rods from the wharf. At the time of the accident she was in the prosecution of her journey, intending to continue it by rail. The supreme court of New York held that the accident was not covered by the insurance, but the court of appeals reversed this decision and said: "It must be conceded that the injury received by the plaintiff's intestate does not come within the strict literal words of the contract of assurance. * * The intestate was not actually traveling upon any public or private conveyance provided for the transportation of passengers at the time of receiving the injury which caused her death. * * The policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language

¹ Theobald v. Assurance Society, 26 ² Champlin v. Assurance Co., 6
Law & Eq. (Eng.) 432; 10 Exch. 45; Lans. 71.

² Big. L. & A. Cas. 393.

used, construed in the light of well-known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into. One fact of this character, very important in the present case, is that of the frequent change required from one train of cars to another at intermediate stations upon the same journey. * * Can it be said that a passenger is not traveling within the meaning of this contract by public conveyance, while passing from one train to go on board another in the actual prosecution of his journey? * * I think that such passenger, within the meaning of this contract, and also within the fair construction of the language, is a traveler by public conveyance, * although he may walk a short distance from the ferry-boat to the train, * or from one train to another, when such changes are made at intermediate stations. An injury received while so necessarily walking in the actual prosecution of the journey, is received while traveling by public conveyance, within the meaning of the policy, as such walking is the actual and necessary accompaniment of such travel. * * It surely can make no difference in principle, that the space to be walked over, in going from one conveyance to another, is a few steps more or less. Nor does it affect the question that the intestate might have procured a hack to carry her, had she so have chosen. She pursued the same course that the great majority of passengers did. This she had the right to do under the contract."¹

¹ Northup v. Assurance Co., 43 N. Y. 516, reversing 2 Lans. 166; 2 Big. L. & A. Cas. 129. An able writer in commenting upon this case, says: "This construction of the contract is open to the objection that the principle laid down would apply equally to walking across the whole city of New York on a through trip to Washington, as well as to going from the ferry-boat at Jersey City to the train in the adjoining station. A traveler, therefore, in prosecuting his journey 'by public or private conveyance' might find himself run over by an omnibus in Broadway, or hurt by a fire-engine in the Bowery, or knocked down by a falling brick from a building, and yet hold the company liable for an injury which is manifestly excluded in contemplation of their contract, and not covered by their premium based on statistics of rail and steamboat casualties. The court says: 'It can surely make no difference in principle that the space to be walked over, in going from one conveyance to another, is a few steps more or less.' Such construction really makes a new contract, which is all the more hard on the insurers, because they issue a 'general accident ticket,'

An accident policy provided that it should be payable "only in the event of death or disability of the assured when caused by an accident while traveling by public or private conveyance." The insured traveled by steamboat to a certain wharf, and started thence on foot for his home, some eight miles distant. When he reached a point on the highway about half way home, he was waylaid, robbed, beaten and bruised, so that he died within a week from his injuries. In an action upon the policy one of the questions raised was whether the insured was traveling by private conveyance at the time he received his injuries. The court below said: "When the term 'private conveyance' is used, as in this policy, to indicate a mode of traveling, its ordinary popular acceptance means a vehicle or instrument of conveyance other and different from the person or thing to be conveyed. It will not answer any just rule of construction to hold that in one sense it is possible to say that a man walking on foot is a private conveyance for himself, and, therefore, such must be its interpretation. The ordinary import of the language, and not the possible import, must control. My opinion is, therefore, wholly with the defendant on this question, and defeats a recovery by the plaintiff."¹ This decision was affirmed on appeal to the supreme court of the United States, and the following opinion on this subject was expressed by that court: "That the deceased was traveling, is clear enough, but was traveling on foot traveling by public or private conveyance? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle

which is this precise risk, and for which the premium is accordingly graduated. Manifestly no form of insurance can be safe which does not rest on averages exact and defined. Accidents while traveling by public and private conveyance are a class by themselves. A person walking is exposed to manifold risks which are excluded in the computation of convey-

ance risks. No construction *contra proferentem* should enlarge a contract of insurance by implication, so as to undermine its very foundation, and yet this is the effect of the decision of the court of appeals." 7 Am. Law Rev. 605.

¹ Ripley v. Assurance Company, 1 Dill. 403; S. C., 2 Big. L. & A. Cas. 738.

employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not."¹

An accident ticket insured the holder against "accident while traveling by public or private conveyance provided for the transportation of passengers." The insured was a locomotive engineer and was killed on an engine while in charge of a train of cars. It was contended that a locomotive or engine was not a conveyance provided for the transportation of passengers. The court said: "This is certainly true, and if the ticket applies solely and exclusively to passengers or travelers, the position that the company is not liable can not be controverted. A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected."²

§ 385. Where a policy insures the holder against accidental injuries received within a specified time, "subject always to the conditions indorsed," the fact that one of these conditions states that this covers only the hazard of travel on the public conveyance of a common carrier, shows no ambiguity or conflict between the general insuring clause and the limiting condition, such as to require its interpretation in favor of the assured to cover risks other than those of a passenger. Where the policy plainly limits the risk covered to that of a passenger on a common carrier's public conveyance, and there is no mistake or fraud, representations of the general agent issuing the policy that it will cover as well all accidents happening to insured while caring for and selling horses which he is

¹ *Ripley v. Assurance Co.*, 83 U. S. (16 Wall.) 336; 2 Ins. L. J. 538; 3 Big. L. & A. Cas. 832, note.

² *Brown v. Assurance Co.*, 45 Mo. 221. The court, in this case, holds the company liable on another ground, but the opinion is certainly vague and unsatisfactory. It is impossible to tell whether the court erroneously assumes that the contract is one against accidents in general, or whether it so

construes it, because of the acts and knowledge of the agent of the company in issuing it to the insured, who was known to be an engineer, and who might reasonably have supposed from the sale of the ticket to him that the engine was to be considered as a part of the "public conveyance,"—the train of cars,—"provided for the transportation of passengers."

taking by railroad to market transgress the agent's apparent authority, and do not bind the company.¹

§ 386. **While traveling in compliance with all rules and regulations of common carriers; violation of rules of employment.**—When the contract provides for insurance against accidents while traveling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers, it is not necessary that the insured, while traveling on a railway train, shall examine the time card to make himself acquainted with all the rules which may be contained upon the time card and ascertain all the *minutiae* connected with the management and running of trains, but he must obey all such rules as a general traveler may be presumed and ought to know. Any other construction than this, of such a clause in a policy, would operate as a snare upon travelers, and be unreasonable.² A person who was injured by being thrown from the steps of a railway car, where he stood while the train was approaching a station, in violation of a known rule of the company, is not entitled to recover.³ But where a rule, forbidding passengers on a railroad train to ride on the platform of a car, is generally disregarded by both passengers and trainmen, it can not be said that to so ride is a violation of "a rule of a corporation," within the meaning of a policy of accident insurance.⁴ Under the defense that the accident occurred "while or in consequence of violating the laws or the rules of a company," within an exception in the policy, it may be shown that there was a general and well-known custom of doing the act complained of at the time and place of the injury.⁵

The fact that a policy insures a person with reference to a particular employment, and provides that the insurer shall be exempt from liability for injuries resulting from a violation of the rules of employment, does not impose on the insurer the duty of informing the assured as to the existence of such rules,

¹ Fidelity & Cas. Co. v. Teter (Ind.), 36 N. East. Rep. 283; Rogers v. Ins. 664.

Co., 121 Ind. 571; 23 N. East. Rep. 498; Ins. Association v. Kryder, 5 Ind. App. 430; 31 N. East. Rep. 851.

² Tooley v. Assurance Company, 3 Biss. 399, *supra*.

³ Bon v. Assurance Co., 56 Iowa

⁴ Marx v. Travelers' Ins. Co., 39

Fed. Rep., 321.

⁵ Duncan v. Association, 13 N. Y.

but the insured is bound to inform himself. Such an exemption must be specially pleaded by the insurer before it can be made available as a defense; and, if it be not pleaded, the court may exclude any evidence offered to establish the rule which it is claimed has been violated.¹

§ 387. **Walking on railway track, etc.**—Where an insurance policy contains prohibitions against walking on a railway track, it means walking along a railway track in the ordinary sense—using it as a highway. The mere using of a track for the width of a street, or the crossing of a track at a street-crossing, are not the kinds of “walking on the track” against which prohibitions are leveled. Common language distinguishes between standing, walking and crossing. To stand or to walk on a road-bed implies some sensible duration of the act, and does not describe a mere crossing for a justifiable purpose.² An insurance did not cover injuries happening to the insured while “walking or being on the road-bed or bridge of any railway.” The insured stepped off a railway train when it came to a stop on a drawbridge at night, fell through a concealed hole in the bridge, and was killed. The court held that the accident was covered by the policy, because the evident intent of the prohibition was to guard, not against injury resulting from a defective road-bed or defective railway bridge, but against the danger of injury from trains passing thereon. The court said: “If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to *railway* bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collision with trains moving thereon.”³ Where an insured was struck by a locomotive engine while he was walking along a railroad track, it was held that he had not used due diligence for his protection.⁴ Where one who is running rapidly toward an approaching train for the purpose of getting the mail-bags,

¹ Standard Life v. Jones, 94 Ala. 434; 10 So. Rep. 530.

² Burkhard v. Ins. Co., 102 Pa. St. 262; see Dougherty v. Ins. Co., 154

³ Wright v. Ins. Co., 29 Up. Can. Pa. St. 385; 25 Atl. Rep. 739.
C. P. 221; Duncan v. Association, 13
N. Y. Supp. 620.

⁴ 7 Am. L. Rep. 595; Tuttle v. Ins. Co., 134 Mass. 175; Lovell v. Ins. Co.,

stumbles as he nears the track, and falls against the engine, the injury is clearly not "intentional" within the exception of an insurance policy; nor can it be construed as the result of "walking or being on a railroad track," or of "voluntary exposure to unnecessary danger," within the meaning of other exceptions.¹ Where a policy provides that walking or being on the road-bed of any steam railway are hazards not covered by it, and the insured while walking between the tracks of the railway, was struck by an engine and killed, the company is not liable.²

§ 388. **Intentional injuries inflicted by the insured or any other person.**—Policies of insurance usually contain a clause providing that no claim shall be made under it where the death of the insured is caused by "intentional injuries inflicted by the insured, or any other person." If the insured is murdered his death is caused by intentional injuries inflicted by another person, and no recovery can be had under such a policy.³ But all such special provisions in a policy are to be strictly construed, and courts have been very loth to exempt accident companies under them unless the case came within their exact language. A policy contained this condition: "This insurance shall not be held to extend to disappearances, or to any cause of death, or personal injury, unless the claimant under the policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the insured or of any other person." The insured was struck under the eye by a man who was attempting to blackmail him, and there were circumstances tending to show that the assailant did not intend to kill him. The insured died about thirty-five days afterward from the effect of the

3 Ins. L. J. 877; 5 Ins. L. J. 559; 38 Mo. App. 640; Fischer v. Ins. Travelers' Ins. Co. v. Jones, 80 Ga. Co., 77 Cal. 246; 19 Pac. Rep. 425; 541; 7 S. East. Rep. 83; Cornish v. Hutchcraft v. Ins. Co., 87 Ky. 301; 8 Ins. Co., 23 L. Rep. Q. B. D. 453. S. W. Rep. 570; 38 Alb. L. J. 68; De

¹ Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201; 9 So. Rep. 869. Graw v. Accident Society, 51 Hun 143; Travelers' Ins. Co. v. McCarthy,

² Piper v. Acc. Association (Mass.), 37 N. E. Rep. 759. 15 Colo. 351; 25 Pac. Rep. 713; Gresham v. Ins. Co., 87 Ga. 497; 13 S.

³ Travelers' Ins. Co. v. McConkey, 127 U. S. 661; 8 Sup. Ct. Rep. 1360; East. Rep. 752; Guldenkirch v. Association, 25 N. Y. St. Rept'r 945. 17 Ins. L. J. 585; Phelan v. Ins. Co.,

blow. In an action on the policy the following instruction was given by the court: "If the death of (the insured) was caused by a blow dealt him by (the assailant), that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that when (the assailant) inflicted such blow he did not mean to kill (the insured)." The supreme court approved the instruction, and held that the condition of the policy, so far as it applied to the circumstances of the case, merely stated that the death should not be the result of the design of any person; that is, that it must not be caused by the act of one whose design was to cause death by the act, and that the condition did not include a case where a blow, not intended to kill, unfortunately and undesignedly produced death.¹ Whether an injury was intentionally inflicted is a question of fact to be inferred from the act itself and from the surrounding circumstances.²

A soldier was shot by a deputy sheriff who attempted to arrest him. There was a conflict of evidence on the point as to whether the officer knew at the time of the shooting that the party shot was the soldier, and also as to whether the killing was in self-defense. The court held that, if the officer did not know that the person he fired at was the soldier, and did not intend to kill the soldier, it could not be said, as a matter of law, that he had lost his life by the design of the officer, within the meaning of an accident policy insuring him, but providing that "the insurance shall not extend to any case of death or personal injury unless the claimant establish by direct and positive proof that the death or injury was caused by external violence and accidental means, and was not the result of design, either on the part of the deceased, or any other person."³

¹ Richards v. Ins. Co., 89 Cal. 170; Utter was killed in a house of ill-fame in Los Angeles, by a pistol shot fired by one Berry, a deputy sheriff of Los Angeles county. It seems that the captain of the company to which Utter belonged learned of his whereabouts, and telegraphed to the sheriff a description of Utter, stating that he was a deserter. This telegram was shown to Berry, and he was instructed by the under-sheriff

² The beneficiary of a contract may not recover where the death of the assured was intentionally caused by his act. Insurance Co. v. Armstrong, 117 U. S. 599; Schreiner v. High Court, 35 Ill. App. 576.

³ Utter v. Ins. Co., 65 Mich. 545; 32 N. W. Rep. 812; 16 Ins. L. J. 532.

It will not be presumed that an insured was murdered from the mere fact that he was found dead on a public highway

to arrest Utter. Berry, without any other warrant, process, or other authority, went to this house where Utter was, and shot and instantly killed him. The facts as to the killing were conflicting, as stated by the different witnesses. There was no dispute with regard to the fact that the officer intended to shoot and intended to inflict bodily injury upon some person. The officer deposed that he knew it was Utter when he fired, but the evidence of a witness who was present, tended very strongly to show that he did not know it was Utter he had shot, and, after he came into the room, thought another man was Utter, until informed by this man that he had shot Utter and "had killed his man." The court said: "It is claimed by the counsel for the plaintiff that the 'design' mentioned in the policy must be considered as a design to kill Utter, and that there was evidence in the case sufficient to go to the jury tending to show that the act that caused the death of Utter was not done with the design of killing him. In other words, if Berry went to the house where Utter was, not with the intention of killing him, but for the purpose of arresting him, and when the door was opened, by reason of Utter's drawing a pistol, or any other cause, he fired, not knowing it was Utter, although the death of Utter was caused thereby, and Berry meant to kill whoever it was, it can not be held that the death of Utter was caused by design; that when the design was to kill, it must also be a design to kill Utter, then formed in the mind, and intentionally carried out by the act. If a person should draw a pistol in a crowded street, and de-

liberately fire the same, with the intent of killing some one, or with a reckless disregard of human life, and a person was killed or wounded, would such killing or wounding be an accident, in the meaning of this policy or would it be by the design referred to therein? There would undoubtedly be a design to kill or wound some one, but no design to kill or wound the particular person injured. Suppose that, for the purposes of plunder, persons arrange to throw a passenger train off a railroad track, knowing that such act is liable to kill or injure some one, but having no malice against any individual thereon, or any design to kill any particular person, and the train is derailed and the assured killed, can it be said that his death was not accidental, under this policy, but by the 'design of some person? The argument may be carried further. Suppose one fires a pistol in the air. He fires by design but does not intend to kill any one. The shot strikes the assured, and kills him. The act which causes the death—the shooting of the pistol—is designed, and therefore not accidental, but the killing is certainly accidental and not designed. If the pistol is fired at one man, and hits another, is it any less accidental, as far as the person hit is concerned, to the mind of the person who does the shooting? And, if the shot is fired at the assured in the belief that he is another man, is not the character of the act the same? If one designedly roll a stone down a mountain side with no intent to injure any one, and in its course it crush a man, it is an accident. If it were purposely rolled down to crush one man, and it is deflected from the course intended, and it kills another,

with a pistol bullet through his heart, but such inferences as to the cause of his death may be drawn as the surrounding cir-

is it not equally an accident? The design or purpose was not to kill the one injured, because it was intended to kill another and not him. The criminal intent of the one putting the stone in motion may render him guilty, and responsible for the actual result, though not intended; yet the death of the person thus killed must be considered, as far as he is concerned, an accident, as his death was not intended by any one.

It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it can not be said that Utter lost his life by the design of Berry. Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill-fame. He was shot, if Berry is to be believed, because he did not throw up his hands when commanded to, and was in the act of drawing a pistol. He was killed, if Brangan is to be believed, without provocation, and in a wanton and murderous manner, as soon as his head appeared in the door. Whether he was doing anything unlawful at the time of the shooting was also a question for the jury, to be determined by them under all the circumstances of the case.

If, on being refused admittance after rapping on the door, the officer had fired through the door, and killed Utter, it could not be claimed that Utter was killed by design, or because he was engaged in any unlawful act; nor if Berry fired at the first head he saw poked out of the door, not knowing or caring who it was, can it be held that the death was by design against Utter, or in consequence of any unlawful act on his part. The clauses in the policy requiring direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person, can not be allowed to govern the courts in cases of this kind. The intent of Berry is locked within his own breast, and can only be determined by his own evidence, or the inferences to be drawn from his acts, which latter would be in the nature of circumstantial proof. If Berry himself had been killed, it would have been impossible, 'by direct and positive proof,' to show what his real design was, and it would also be manifestly against the policy of the law, and diametrically opposed to justice, to allow his own testimony of his own motives, however unsatisfactory it might be, to be controlling, when all the facts of his actions and language at the time contradicted his positive assertions of his intent upon the trial. If this clause can be allowed to stand, any person accidentally killed, when no one is by, is debarred from the benefit of his insurance. Circumstances may plainly and almost certainly indicate that he was killed by accident, and yet no positive and direct proof can be furnished. If an accident happen

cumstances will justify.¹ It is not to be presumed that an injury was self-inflicted, or that it was intentionally inflicted by any other person; the burden is on the society to establish such defenses.² The fact that a person insured engaged in a

upon a railroad by the fault of one of its employes, who is killed by the accident, his design in causing such accident can not be shown by direct and positive proof, and the beneficiaries of an assured person killed by such accident can not recover. The design of the person responsible for the killing can in no case be directly and positively proved except by his own evidence or admissions. Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract can not agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive proof, in many cases would, in effect, preclude the court from jurisdiction and bar recovery. If they can make this agreement they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial. They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself. Wood on Ins., 750. Circumstantial evidence is regarded by the law as competent to prove any given fact; and sometimes it is as cogent and irresistible as direct and positive testimony. The case should have been submitted to the jury. The 'design' mentioned in the policy must be considered a design on the part of Berry to kill Utter; and if, at the time he fired the pistol shot, he

did not intend to kill Utter, or did not know that the man he was shooting was Utter, there is nothing in the present record to prevent a recovery by the plaintiff."

¹ *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; 8 Sup. Ct. Rep. 1360; 17 Ins. L. J. 585; *Washburn v. Society*, 10 N. Y. Supp. 366.

² *Peck v. Accident Association*, 52 Hun 255; *Mallory v. Ins. Co.*, 47 N. Y. 52; *Wright v. Ins. Co.*, 29 Up. Can. C. P. 221; *Washburn v. Society*, 10 N. Y. Supp. 366. In an action on an accident policy, it appeared that the assured was found dead in the back room of a house, shot through the heart. He had been dead about half an hour, and there were no powder marks on his flesh or clothing. A door opposite to where his body lay opened into another room, in which was found, mortally wounded, a woman, who had been shot with a pistol ball in the side, and whose flesh and clothing were powder burned. Near her was a pistol, but it was not shown whether loaded or not, nor was it shown that the wounds in the two bodies were made by this or a pistol carrying the same sized ball. She had been the mistress of assured for some time, and had lived with him as such, but it was not shown whether or not this was notorious and open. The day previous, assured had stated to a friend that he was tired of the woman, and intended to break with her next summer when she went home to visit her family. Assured was a quiet, timid man, of good reputation for peace, and did not intimate to this friend that he

fight, though he himself was not the aggressor, brings the injuries received by him within a condition of his policy, providing that it would not cover accidental injuries resulting from or caused directly or indirectly, wholly or in part, by fighting.¹ It makes no difference in such a case whether the slayer is sane or insane.²

§ 389. **Intoxication—Under the influence of liquor.**—A provision in a policy exempting the insurer from liability for any injury which might happen to the assured while intoxicated, or in consequence of his having been under the influence of intoxicating liquor, is sufficient to exclude liability for all injuries suffered while the assured was intoxicated, whether the intoxication contributed to the injury or not. A policy provided, "No claim shall be made under this policy where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." The insured was accidentally shot, while intoxicated, by a drunken companion, with whom he had been drinking. It was held that the policy was avoided, that the provision avoided liability, if the insured was in the condition of intoxication, without regard to whether it had any agency in producing the death or injury. The court said: "The cases which hold that the insurer must show that the relation of cause and effect exists between the thing prohibited and the death or injury, have no application to the clause under consideration, as it avoids liability if the insured was in a certain prohibited condition, without regard to whether it had any agency in producing death or injury. By putting himself under the influence of liquor, he deprived the company of the security it would otherwise have had that he would do nothing to expose his life or health unnecessarily to injury." The limitation in the policy related to the con-

used, or intended to use, any violence toward her. The court charged that the presumption of law was that assured did not commit suicide, and was not murdered, but that these presumptions might be overcome by facts showing the contrary, which the jury were to consider. This charge was correct, as no presump-

tion of fact arose from the evidence that assured was either killed by the woman or committed suicide. *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; 16 S. W. Rep. 723.

¹ *U. S. Association v. Millard*, 43 Ill. App. 148.

² *Gresham v. Ins. Co.*, 87 Ga. 497.

dition of the insured, not to the cause which might produce his death. The intention, evidently, was to limit the liability of the company and not to incur any responsibility when the injury occurred while the insured was directly under the influence of, or where the result was remotely produced by, intoxicating drinks.¹ If there is an inconsistency between the terms of the application for the policy and the policy itself, excepting injuries resulting from intoxication or received while under the influence of intoxicants, the policy must control; but where the application uses the words, "any accidental injury which may happen to me while under the influence of intoxicating drinks, or in consequence of having been under their influence," and the policy excepts injuries "happening to the insured while intoxicated, or in consequence of having been under the influence of any intoxicating drink," there is no material difference between the two; and it is not necessary, in order to make out the defense, that intoxication should have contributed to the injury.²

§ 390. In an action on an accident policy to recover for the death of the insured, where the defense is that the accident was caused by the deceased falling out of a window while drunk, it is not error to refuse to admit testimony that on a previous occasion the deceased, while drunk, attempted to jump from the window. As a general rule it is inadmissible, even where the issue is whether a person did a particular thing, to put in evidence the fact that he did a similar thing at some other time;³ and the issue of self-destruction is entirely different from the one presented in such a case. In such an action testimony of a witness that shortly before the accident the deceased did not appear to be drunk, that she found him lying on the ground insensible early the next morning, when a physician was immediately sent for; the testimony of the attendant physician that when he first saw the deceased he thought he was drunk, but that this idea on examination was quickly dispelled; also testimony that the deceased took a glass of beer just before going home, and was not drunk then,

¹ *Shader v. Assurance Co.*, 5 *Thomp. Ala.* 434; *Sharler v. Assurance Co.*, & C. 643; affirmed 66 *N. Y.* 441; 5 *Life & Acc. Ins. Reps.* 331; 5 *Standard Life v. Jones*, 94 *Ala.* 434; *Thomp. & Cook (N. Y.)* 643. 10 *So. Rep.* 530.

³ 1 *Whart. Ev.* § 29.

² *Standard Ins. Co. v. Jones*, 94

that he had only had three glasses of beer, and never drank whisky—is sufficient to sustain a finding that the deceased was not drunk at the time of the accident.¹ A witness may state whether or not a person had the appearance of being intoxicated, for that would be a statement of a fact. Sanity, intoxication, and the state of health are facts which may be proved by appearances.² It is competent for the company to show what insured's condition was when he received the injuries, and in order to do this witnesses may be asked whether he impressed them as being intoxicated; whether he was drunk or sober; and whether, in their judgment, he was as capable of taking care of himself as though he were sober.³ A provision in an accident policy that none of its conditions can be waived by any agent of the company is valid, and a condition that the insurance does not cover a death resulting from intoxication is not waived because the agent who received and filled out the application knew that the applicant was an intemperate man, though the application stated that his habits were correct and temperate.⁴ Evidence that when last seen, late one night, insured was more or less drunk, and some distance from his home, near which were a bridge with low rails, and lowlands then covered by the river, is not so conclusive that he met his death while drunk as to warrant a non-suit.⁵

§ 391. **Fits, vertigo, fainting.**—One who is subject to faintings and “swimmings in the head,” is not on that account subject to “epileptic or other fits,” and he may so declare in his application for insurance.⁶ An insured, while at a railway station, was seized with a fit and fell forward off the platform across the railway, when a passing train ran over his body and killed him. It was held that the train passing over his body, and not the fit, was the cause of his death.⁷ While fording a

¹ Travelers' Ins. Co. v. Harvey, 82 Va. 949; 5 S. E. Rep. 553.

⁵ Conadeau v. Am. Acc. Co. (Ky.), 25 S. W. Rep. 6.

² Cook v. Ins. Co., 84 Mich. 12; 47 N. W. Rep. 568; State v. Pike, 49 N. H. 407.

⁶ Shilling v. Ins. Co., 1 Foster & Fin. 116; see § 370.

³ Cook v. Ins. Co., *supra*.

⁷ Lawrence v. Ins. Co., 7 L. R., Q. B. Div. 216; see § 397.

⁴ Cook v. Ins. Co., *supra*; Newman v. Association, 76 Iowa 56.

river an insured was seized with a fit, fell into the water and was drowned. It was held that the death did not arise from disease, but from accidental drowning.¹ Under a provision of an accident policy, stating that the risk shall not extend to "accidental injuries or death resulting from or caused, directly or indirectly, by fits, vertigo or other disease," an accidental death by drowning results from and is caused indirectly by fits, vertigo, or other disease if the fall into the water, from which drowning takes place, is caused by such disease.² A provision in an accident policy stating that the risk shall not extend to death caused by bodily infirmities or disease, does not include fainting produced by indigestion or lack of proper food, or any other cause which would show a mere temporary disturbance or enfeeblement.³ It is not a voluntary exposure to obvious risk for an insured who is subject to faintings and "swimmings in the head" to go driving in a carriage with another person.⁴ An insured, who was subject to epileptic fits, was found dead in a plunge-bath in almost a standing position. There was an abrasion between his eyes and a bruise on one side of his head. His physician testified that his hot bath had probably brought on an epileptic attack, because of his peculiar condition of health at that time, and that the fall or blow which caused the abrasion and bruise was not sufficient to have caused his death. Upon this evidence it was held that the death of the insured was caused by disease and not by accident.⁵

§ 392. **Drowning.**—When it is shown that the insured died in the water, it is for the jury to determine whether he died from the action of the water, or from natural causes. The jury may reasonably presume that he died from drowning, for while it is true that in some instances death occurs in the water from natural causes, as from apoplexy or cramp in the heart, such cases are rare and bear a small proportion to the number of deaths which take place from the action of the water. If they decide that he died from the action of the water causing asphyxia, that is a death from external vio-

¹ *Winespear v. Ins. Co.*, 6 L. R., Q. B. Div. 42; see §§ 392, 397; see *Reynolds v. Ins. Co.*, 22 L. T. Rep. N. S. 820.

² *Manufacturers' Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

³ *Manufacturers' Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

⁴ *Shilling v. Ins. Co.*, 1 Foster & Fin. 116.

⁵ *Tennant v. Ins. Co.*, 31 Fed. Rep. 322; 16 Ins. L. J. 476.

lence within the meaning of a policy—whether he swam to a distance and had not strength enough to regain the shore, or, on going into the water, got out of his depth. The discharge of water from the lungs of a person who has been drowned is a sufficient showing of an injury by some outward and visible means, and external and material cause operating upon his person.¹ The action of the water in cutting off or stopping respiration is an external force, and is the immediate cause of death. The insured, while crossing a stream, was seized with an epileptic fit, fell, and was drowned. He did not sustain any personal injury to occasion death, other than drowning. His policy covered only injury or death “caused by some outward and visible means,” and the company was held liable.² A policy provided that they should only be liable in case the death or injury should be occasioned by some external and material cause operating upon the person of the insured. While in a pool about one foot deep, the insured became suddenly insensible from some unexplained internal cause, and fell into the water with his face downward. A few minutes afterward, he was found lying dead with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The immediate cause of his death was suffocation by the water, but, the pool being shallow, such suffocation would not have taken place had he not been incapable of helping himself, in consequence of his insensibility. It was held that the company was liable, the court saying: “In this case the death resulted from the action of the water on the lungs, and from the consequent interference with respiration. I think that the fact of the deceased falling in the water from sudden insensibility was an accident, and consequently that our judgment must be for the plaintiff.”³ A drowning caused by a temporary trouble to which the insured was not subject, but which was entirely unusual and uncommon, whereby he fell into the water, is

¹ *Trew v. Assurance Co.*, 9 W. R. 671; 30 L. J. Exch. 317; 6 Hurl. & N. Rep. 460; 6 L. R., Q. B. Div. 42; 42 839; *Reynolds v. Insurance Co.*, 18 L. T. Rep. 900; 22 Alb. L. J. 223. W. R. 1141; 22 L. T. (N. S.) 820; ³ *Reynolds v. Ins. Co.*, 22 L. T. R. (N. Tucker v. Mutual Ben. L. Co., 4 N. S.) 820; all the justices concurring. Y. Sup. 505; 50 Hun 50; see §§ 373, 379.

accidental, within the meaning of a policy of insurance.¹ Death by drowning is caused indirectly by disease, within the meaning of an accident policy, if the fall into the water was caused by such disease.² Where the insured fell, struck his head against some sharp substance, fell into the water and was drowned, his death was held to have been caused by accidental, and violent means, of which there were outward and visible signs.³ An insured was a healthy man and a good swimmer. He went in bathing, became disabled from cramps or otherwise, was unable to swim, cried for help, but not securing timely assistance, sank out of sight, and was found dead the next day beneath the water. It was held that his death was caused by "outward force and accidental means."⁴

It is not an obvious risk or a voluntary exposure to unnecessary danger, within the meaning of a policy, for one who can swim to bathe in deep water.

§ 392a. A member of a benefit society left his home, with soap and towel, stating that he intended to bathe in Lake Michigan, which was about a mile distant, but he never returned. His clothing and money were found on the shore, and there were footprints leading to the water's edge. No reason was shown why he should abandon his family. There was evidence that the lake was dangerous at that place. It was held that there was sufficient evidence to warrant a verdict that the member was dead. Evidence that other persons had been drowned in the same locality was slightly relevant to show that that part of the lake was dangerous.⁵

Proof that the body of the insured, whose temper and circumstances almost precluded the idea of suicide, was found in the river long after his disappearance, with no mark of violence or robbery, made a case for the jury of accidental drowning.⁶

¹ Manufacturers' Indemnity Co. v. App.), 37 N. East. Rep. 1105; see Tisdale v. Ins. Co., 26 Iowa 170; S. C., Dorgan, 58 Fed. Rep. 945.

² Idem.

³ Mallory v. Ins. Co., 47 N. Y. 52.

⁴ Knickerbocker Casualty Ins. Co. v. Jordan, 7 Cin. L. Bull. 71.

⁵ Supreme Council v. Boyle (Ind.

28 Iowa 12; Ins. Co. v. Moore, 34 Mich. 42.

⁶ Conadean v. Am. Acc. Co. (Ky.), 25 S. W. Rep. 6.

CHAPTER XXIX.

ACCIDENT INSURANCE.

- § 393. Poison.
- 394. Inhaling gas.
- 395. Death or disability caused by any surgical operation or medical or mechanical treatment for disease.
- 396. Hernia, erysipelas.
- 397, 398. Proximate cause of the death of the insured.
- 399. Bodily infirmity.
- 400. Loss of foot, eye or hand.
- 401-405. Permanent or total disability.
- 406. A company may be liable for sick benefits, though not liable for the death of the insured.

§ 393. **Poison.**—In its ordinary meaning, poison is a substance taken internally, seriously injurious to health and often fatal to life; and “death by poison” is understood to mean death arising from the taking of poison. Such a phrase would never be applied to death from the bite of a rattlesnake or from blood poisoning. Death by inhaling coal or illuminating gas is not death by poison, using that word in its proper sense. Such gases kill by shutting off the supply of oxygen and preventing the discharge of carbonic acid in the blood. Death is caused in this way by suffocation, choking and drowning, and it is quite as proper to say of a man drowned that he was poisoned by water, as to say that a man was poisoned by gas.¹ When the insured died from malignant pustule produced “by the infliction of animal substances upon the body,” by the accidental deposit of putrid and poisonous animal substance from the bodies, skins or hides of animals suffering from a peculiar disease, it was held to be a death from disease, a “death by poison in any manner or form,” within the meaning of the exception set forth in the policy, and not a death from violent, external and accidental means.²

¹ See § 394.

ing 44 Hun 599; 3 N. Y. Supp. 237.

² Bacon v. Accident Ass'n, 123 N. Justices O'Brien and Ruger filed a Y. 304; 25 N. East. Rep. 399; revers- dissenting opinion.

Where a contract declares that it shall not extend to any death or disability which may have been caused "by the taking of poison," it is not necessary that the poison be taken with an intent to produce death, in order to defeat a claim under it. If the poison be innocently taken, and without any knowledge of the injurious effect which it was likely to produce and did produce, the effect is, doubtless, accidental so far as the person taking it is concerned; yet, it is one of the accidental means expressly excepted from the contract. An insured, mistaking birch oil for milk of birch, took a good drink of it, and died from its poisonous effects within twenty-four hours. Milk of birch is a harmless beverage very closely resembling birch oil in color, smell and taste, and the insured had been in the habit of drinking it. The contract provided that its benefits did not extend "to any bodily injury happening directly or indirectly by the taking of poison;" and it was held that the terms of the contract did not extend to the cause of the death.¹ In the course of his business, a physician mixed some poison with water in a goblet, and afterward, mistaking the mixture for pure water, and without any intention of taking his life, drank it and died from its effects. It was held that the proviso in his policy, excepting from the insurance a death caused "by the taking of poison," was not limited to cases of intentional self poisoning, but included all cases in which death was so caused.²

It has been held that death by the taking of poison is not effected through external, violent and accidental means, within the meaning of a policy, that violence can not fairly be said to be an ingredient in the act of taking a dose of poison, although the poison may be violently destructive in its action.³

¹ Pollock v. Accident Association, 102 Pa. St. 230; 28 Alb. L. J. 518; 12 Ins. L. J. 730; 48 Am. Rep. 204; Cole v. Ins. Co., 61 Law Times Rep. 227; Michigan Mutual v. Naugle, 130 Ind. Co., 112 N. Y. 472.

² Hill v. Ins. Co., 22 Hun 187, Follett, J., dissenting and holding that the word "taking," in this connection, means an intentional taking, either with or without intent to destroy life, and that this phrase is in-

³ Pollock v. Association, *supra*; Bayless v. Ins. Co., 14 Blatchford 143; Hill v. Ins. Co., 22 Hun 187, Follett, J., dissenting. The case of Hill v. Ins. Co., *supra*, was disapproved in Paul v. Ins. Co., 45 Hun 313, on this point, and this rule was

But this rule has been declared to be too strict, and against the principles governing the construction of the terms of policies of insurance.¹

An averment in an answer or plea to an action on an accident insurance policy, that by its terms the policy was not to "extend to or cover death resulting from or caused by poison, * * * or contact with poisonous substances," and that "said alleged injury was caused by poison and contact with poisonous substances," is bad as being merely an argumentative denial of the allegation in the petition that the death "resulted alone from said injury."²

§ 394. **Inhaling of gas.**—Where one, having descended into a well, dies from *asphyxia* due to some deadly gas, his death is not due to "the inhalation of gas," within the meaning of the terms of the policy excepting death so caused from its indemnity, for such exception has reference only to a voluntary inhalation of gas.³ Such an exception does not apply to accidental death, caused by breathing, while asleep, the atmosphere of a room filled with illuminating gas. Gas in the atmosphere, as an external cause, is a violent agency within the

declared to be too strict, and not in accordance with the purposes and intent of the parties and the proper rules of interpretation of such contracts. In *Penfold v. Ins. Co.*, 85 N. Y. 317, it was held that a condition of a life policy, avoiding it if the insured "died by his own hand or act, voluntarily or otherwise," did not exempt the company from liability in case of a purely accidental death caused by poison taken by the assured through mistake or ignorance. See *Equitable Life v. Paterson*, 41 Ga. 338; *Healey v. Association*, 133 Ill. 556; 25 N. East. Rep. 52; *Colt v. Ins. Co.*, 54 N. Y. 595; *Dilleber v. Ins. Co.*, 69 N. Y. 256; *Bailey v. Ins. Co.*, 80 N. Y. 21. The means of death by poison are violent, not natural, or spontaneous; and not occurring from usual and natural causes. The degree of force or violence is not material. *Southard v. Assurance Co.*, 34 Conn.

574; *Trew v. Ins. Co.*, 6 H. & N. 845; *Reynolds v. Ins. Co.*, 22 L. T. (N. S.) 820; *McGlinchey v. Casualty Co.*, 80 Me. 251; 14 Atl. Rep. 13; *Healy v. Association*, *supra*. An examination of the cases cited in support of the text will show that the decisions were really placed on other grounds.

¹ *Paul v. Ins. Co.*, 112 N. Y. 472; 45 Hun 313; *Reynolds v. Ins. Co.*, 22 L. T. (N. S.) 820; *Martin v. Ins. Co.*, 1 *Fost. & Fin.* 505; *Winspear v. Ins. Co.*, 6 Q. B. D. 42; 43 L. J. Rep. 459; *McGlinchey v. Casualty Co.*, 80 Me. 251; *Healey v. Association*, 133 Ill. 556; 25 N. East. Rep. 52; *Pickett v. Ins. Co.*, 144 Pa. St. 79; 22 Atl. Rep. 871; *Martin v. Association*, 16 N. Y. Supp. 279; see § 374.

² *Bernays v. United States Mut. Acc. Ass'n*, 45 Fed. Rep. 455.

³ *Pickett v. Ins. Co.*, 144 Pa. St. 79; 22 Atl. Rep. 871.

provision of the certificate, requiring the death to be caused by external and violent means to bring it within the terms of the contract.¹

But death by inhaling illuminating gas, which accidentally escaped into the room where the insured was sleeping, is within an exception of an accident policy, which states that it "does not insure against death or disablement arising from anything accidentally taken, administered or inhaled, inhaling gas or any surgical operation."²

It has been held that, under this exemption, a recovery may not be had in case of death caused by the inhalation of illuminating gas, where it is uncertain whether the death was the

¹ Paul v. Travelers' Ins. Co., 112 N. Y. 472; 20 N. East. Rep. 347; S. C., 45 Hun 313. The court said: "I agree with the counsel of the respondent in his suggestion that if the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word 'inhale.' If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. * * That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." See also U. S. Mut. Acc. Ass'n v. Newman, 84 Va. 52; 3 S. East. Rep. 805; 17 Ins. L. J. 97; § 379.

² Menneiley v. Assurance Corporation, 72 Hun 477; 25 N. Y. Supp. 230. The court said: "It has been held by the court of last resort in this state that the words 'inhaling gas' in a similar exception contained in the contract of another insurer against accidents, 'the company can only be understood to mean a voluntary or intelligent act by the insured, and not an involuntary and unconscious

act.' Paul v. Ins. Co., 112 N. Y. 472; 20 N. East. Rep. 347. So that if the exception of death or disablement by 'inhaling gas' was the one relied upon by the defendant here, the authority cited would be conclusive against its contention. But such is not the case. The exception here relied upon, which was not in the policy in the case of Paul, expressly describes an act not voluntary and intelligent, but, on the contrary, accidental. The death or disablement excepted is one 'arising from anything accidentally inhaled,' and here was the death of the insured arising from illuminating gas accidentally inhaled. It seems difficult to elaborate or prolong an argument upon this statement. Here is no room for interpretation. * * * The exception here relied upon, if expressly framed to avoid the construction put upon that in the case of Paul, *supra*, could not more successfully have accomplished the purpose. It would be a contradiction in terms to apply the words 'accidentally inhaled' to the voluntary and intelligent act of inhaling an anæsthetic in aid of a surgical operation, which the court say was apparently the reference in that case."

result of an accident or of suicide.¹ Where the insured was found dead in bed, with a ball of tough froth over his mouth, slightly tinged with blood, and some red splashes on the side of his face and on his breast, the room being full of coal gas, it was held to be a question of fact, properly determinable by the jury, whether these were visible and external signs of injury.²

§ 395. **Death or disability caused by any surgical operation or medical or mechanical treatment for disease.**—

Death caused by the act of taking medicine, done with the intention to cure, is a death caused wholly or in part by medical treatment for disease; and where a specified dose of opium was prescribed to the insured by his physician to allay nervousness and restlessness, and, by inadvertence, he took more opium than he intended, and his death resulted from such overdose, it was held that the company was not liable under his policy, as it expressly excepted "any death or disability which may have been caused wholly or in part by any surgical operation or medical or mechanical treatment for disease."³ Where a person, injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the accident is the proximate cause of his death.⁴

¹ Richardson v. Ins. Co., 46 Fed. Rep. 843. In this case the proofs showed that the assured retired to his room in the hotel at which he was a guest, and on the next morning was found dead in his bed, with illuminating gas escaping freely from one of the gas burners in the room. In speaking of the case of Paul v. Ins. Co., *supra*, Judge Blodgett said: "The reasoning by which that court reached its conclusion is not satisfactory to my mind. The language of the policy is so clear as to require no construction. The words are unequivocal that the defendant does not insure against death caused by inhaling gas. There is nothing in the terms of the policy intimating or suggesting that the inhalation of gas

must be voluntary or involuntary in order to exempt defendant from liability. * * This case can also, as I think, be differentiated from (Paul v. Ins. Co.), in this: that in that case it was found as one of the facts that the death of the assured was occasioned by accidental means. Here the proof will allow no such finding. It leaves the fact wholly unsettled as to whether the death was the result of accident, or whether it was occasioned by his suicidal act and intent."

² U. S. Mut. Acc. Ass'n v. Newman, *supra*.

³ Bayless v. Ins. Co., 14 Blatchford 143; 6 Ins. L. J. 109.

⁴ Travelers' Ins. Co. v. Murray, 16 Colo. 296; 26 Pacific Rep. 774.

§ 396. **Hernia, erysipelas.**—A policy excepted any liability for “hernia, erysipelas, or any other disease or cause arising within the system of the assured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury.” It was held that death from strangulated hernia caused solely by external violence, followed by a surgical operation performed for the relief of the patient, was covered by the policy, not being included within the terms of the exception. The court said: “It is to my mind merely a question whether the proviso at the end of the first condition, that the company does not insure against death or disability arising from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether ‘hernia’ is governed by the other words ‘or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury.’ * * * Looking at the language of the policy, and taking the first condition all together, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where hernia arises within the system. * * * Hernia is not in all cases a disease arising within the system. It may or may not do so. I think the company is not relieved from responsibility where the hernia is caused by external violence.”¹ It seems that rheumatism and gout are constitutional diseases and always arise within the system, but that hernia and erysipelas may arise within the system or from external violence.

Where a policy provides that the insurance does not cover disability or death resulting wholly or partly, directly or indirectly, from medical or surgical treatment or hernia, and the insured, injured in an accident which brought about hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the company is liable on the ground that the accident is the proximate cause of his death. An insurer against death “from bodily injuries effected through external, violent and accidental means,” but excepting death from hernia, is not relieved from liability where death results from hernia,

¹ Fitton v. Ins. Co., 112 Eng. Com. Law (17 C. B. N. S.) 122.

caused by "external, violent and accidental means."¹ In an action on a policy of accident insurance for the death of the insured from hernia caused by an accident, where the defense is that for years before, he was afflicted with chronic hernia, testimony as to his continued good health, bodily vigor and ability to work is admissible. It may also be shown that during a surgical operation no trace was found of the existence of a case of chronic hernia.² In a suit on an accident policy, where the petition alleged that deceased died from erysipelas, resulting from an accidental laceration of a finger an answer averring that in his contract with the insurer, deceased had warranted "that he had never had, and had not then, any bodily or mental infirmity, whereas in truth * * * said deceased had on various occasions prior thereto been afflicted, and was then subject to and infected with erysipelas, and that he eventually died of erysipelas," is demurrable, as failing to state a defense in that it does not show that erysipelas was an infirmity which increased the risk of death in the event of an accident.³

§ 397. **Proximate cause of the death of the insured.**—Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. In other words, the application of the principles relating to proximate cause is not necessarily controlled by time or distance, or by the succession of events. An efficient, adequate cause when found, must be deemed the true cause unless some other, not incidental to it, but independent of it, is shown to have intervened between it and the result.⁴ In an action on an accident policy where it is shown that the deceased sustained an accidental injury to an internal organ, and that this necessarily produced inflammation, and that the inflammation produced a disordered condition of the injured part, whereby

¹Travelers' Ins. Co. v. Murray, 16 Colo. 296; 26 Pac. Rep. 774. Co. v. Kellogg, 94 U. S. 469; Lawrence v. Ins. Co., 7 L. R. Q. B. Div.

²Travelers' Ins. Co. v. Murray, 216; McCarthy v. Ins. Co., 8 Biss. 362; Mallory v. Ins. Co., 47 N. Y. 52; Ins.

³Bernays v. Association, 45 Fed. Co. v. Crandal, 120 U. S. 527; 7 Sup. Ct. Rep. 685; Blackstone v. Ins. Co., Rep. 155.

⁴Kellogg v. Railway Company, 26 Wis. 223; Perley v. Railway Co., 98 Ins. Co. v. Murray, 16 Colo. 296; 26 Mass. 414; Milwaukee, etc., Railway Pac. Rep. 774, hernia.

other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity, a then existing, but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury can not be considered the sole and proximate cause of death.¹

A policy issued against "injuries accidentally occurring from material and external causes, operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured; but it does not insure in case of death arising from fits, * * or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." The insured, while at a railway station, was seized with a fit, fell forward on the track and was run over by a passing train. The falling forward of the insured off the platform was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered death in this manner. The court said: "The question arises whether, according to the true construction of the proviso, it can be said that this is a case of death arising from a fit; because if this death did not arise from the fit, according to the true construction of the policy, the remainder of the clause does not come into existence at all, and is inapplicable. * * According to the true principle of law, we must

¹ Barry v. Accident Association, 23 Fed. Rep. 712; Southard v. Assurance Co., 34 Conn. 574; N. Am. Ins. Co. v. Burroughs, 69 Pa. St. 43; Whitehouse v. Ins. Co., 7 Ins. L. J. 23; McCarthy v. Ins. Co., 8 Ins. L. J. 208; 8 Biss. 362; National Ass'n v. Grauman, 107 Ind. 288; see *Terre Haute, etc., R. R. Co. v. Buck*, and cases cited and reviewed; *Insurance Co. v. Seaver*, 86 U. S. (19 Wall.) 531; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Insurance Co. v. Tweed*, 74 U. S. 44; *Baltimore, etc., R. R. Co. v. Reany*, 42 Md. 117; *Tuttle v. Ins. Co.*, 134 Mass. 175; *Peck v. Accident Association*, 23 N. Y. St. Rep. 465; 52 Hun 255; *Standard Life v. Thomas* (Ky.), 17 S. W. Rep. 275; *Isitt v. Assurance Co.*, 5 Times L. Repts. 194; L. R., 22 Q. B. 504; *Anderson v. Ins. Co.*, 17 Session Cases (4th series) 6; *Cawley v. Association*, 1 Cababe & Ellis, 597, where death would not have ensued from the accident had the insured not at the time been suffering from gall stones.

look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. * * Supposing a man were out in the field following sports, and he were to be seized with a fit, either a fainting fit or epileptic fit, or any other fit, and had retired to one side of the field and remained there recovering from the fit, and being there, a sportsman not knowing he was there, accidentally shot him, it might be said, in the same manner that the cause of death arose from a fit. It seems to me only to require to be stated, to show the entire absurdity of it. The only difference between that case and this is in the time that intervened between the time of the fit and the person being placed within the influence of the succeeding accident, which in this case was very short; but I fail to see in point of reason that there is any difference between one hour or one minute or one day. The break in the chain of causes seems to be equally complete. I therefore put my decision on the broad ground, that, according to the true construction of this policy and its proviso, this was not an act arising from a fit, and therefore, whether it contributed directly or indirectly, or by any other mode to the happening of the subsequent accident seems to me wholly immaterial."¹ A policy contained a proviso that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." While the insured was fording a stream he was seized with an epileptic fit, fell into the stream and was drowned. It was held that the company was liable on its policy, since the death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning.²

Under a provision of an accident policy, stating that the risk shall not extend "to any case except when the accidental injury shall be the proximate and sole cause of disability or death," if the insured suffer death by drowning, the drowning

¹ Lawrence v. Ins. Co., 7 L. R., Q. ² Winspear v. Ins. Co., L. R., 6 Q. B. Div. 216; 45 L. T. Rep. (N. S.) 29; B. Div. 42; 43 L. T. Rep. N. S. 459. see Reynolds v. Ins. Co., 22 L. T. R. N. S. 820.

is the proximate and sole cause of death, no matter what the cause of falling into the water, unless death would have been the result without the presence of the water.¹

§ 398. A policy insuring against death, effected through external, violent, or accidental means, but excepting all cases in which there should be no visible sign of bodily injury, or in which death should occur in consequence of disease, or in which the injury was not the proximate cause, does not relieve the insurer from liability, where death results from peritonitis occasioned by a fall; and this, even though the assured had previously had peritonitis, and had thus been rendered peculiarly liable to a recurrence. In such a case an instruction that there must have been visible signs of injury effected through external, violent or accidental means, and that such injury must alone have occasioned death, to enable the assured to recover, was sufficiently favorable to the insurer.²

A policy insured against cuts, stabs, concussions, etc., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, * * but it does not insure against death or disability arising from * hernia, or any other disease or cause arising within the system of the insured before or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury." The insured accidentally fell with violence on the floor of his room, and was immediately ruptured in his bowels, and became at once afflicted with strangulated hernia in his abdomen. A surgical operation was necessarily performed for the purpose of relieving him, and he soon afterward died from the hernia and from the surgical operation. It was held that the policy should be construed to mean that hernia arising within

¹ *Manufacturers' Indemnity Co. v. McDonald v. Snelling*, 14 Allen 290; *Dorgan*, 58 Fed. Rep. 945; *Winspear Perley v. Railroad Co.*, 98 Mass. 414; *v. Ins. Co.*, 6 Q. B. Div. 42; *Reynolds Metallic Compression Casting Co. v. Ins. Co.*, 22 Law Times (U. S.) *Fitchburg Railroad Co.*, 109 Mass. 277; 820; *Lawrence v. Ins. Co.*, 7 Q. B. *Benefit Ass'n v. Grauman*, 107 Ind. Div. 216; *Ins. Co. v. Crandall*, 120 U. 288; 7 N. E. Rep. 233; *Insurance Co. S. 527*; 7 Sup. Ct. Rep. 685; *Trew v. v. Burroughs*, 69 Pa. St. 43; *Sheanon Assurance Co.*, 6 Hurl. & N. 838. *v. Insurance Co.*, 77 Wis. 618; 46 N.

² *Freeman v. Association*, 156 Mass. W. Rep. 799; *Insurance Co. v. Tweed*, 351; 30 N. East. Rep. 1013; citing 7 Wall. 44; *Insurance Co. v. Seaver*, *Marble v. Worcester*, 4 Gray 395; 19 Wall. 531.

the system independently of external violence was not insured against, but that death from hernia, caused solely and directly by external and accidental violence and a necessary surgical operation, was not within the exception.¹

A policy of insurance against death from accidental injury contained the following condition: "This policy insures against all forms of cuts, * * when accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure against death arising from * erysipelas, or any other disease or secondary cause or causes arising within the system of the insured, before, or at the time of, or following such accidental injury, whether causing such death directly or jointly with such accidental injury." The assured accidentally cut his foot against the broken side of an earthenware pan. Five days afterward erysipelas supervened, and seven days afterward he died of that disease. The erysipelas was caused by the wound, and but for the wound he would not have suffered from it. In an action on the policy, it was held, that the company was protected by the above condition, and was not liable.² In *Harris v. Ins. Co.*,³ the insured, who was a fireman, was accidentally buried under a falling wall. He was soon rescued without apparent injury, and continued his work for about three months, when he took poison and died. In a suit on the policy on the ground that the accident rendered him insane, it was held, that, if he was insane on account of the accident, the death was too remote to be covered by the policy, which included only proximate results.⁴ Where the plaintiff's evidence tended to show that the death of the insured was caused by embolism or thrombus, the direct result of the breaking of his arm a few days before, while the evidence for the company tended to show that death was caused by pneumonia, the court refused to disturb the finding of the jury, that the frac-

¹ *Fitton v. Ins. Co.*, 112 Eng. Com. were placed in the policy after the Law (17 C. B. N. S.) 122; 34 L. J. C. decision in the case of *Fitton v. Ins. Co.*, 28; *Travelers' Ins. Co. v. Murray, Co.*, *supra*, 16 Colo. 296; 26 Pac. Rep. 774.

² Superior Court of Chicago (1868).

³ *Smith v. Insurance Co.*, 5 L. R. 7 Am. L. J. 589.

⁴ *See Scheffer v. Railroad Company*, Exch. 302; 22 L. T. Rep. N. S. 861. The words "or secondary cause" 105 U. S. 249.

ture of the decedent's arm alone caused his death, and that it was the sole and proximate cause.¹ The evidence in a case showed that death was caused by blood-poisoning occasioned by the inoculation of some poisonous substance into a wound when or very soon after it was made. It was held that if the inoculation occurred at the time the wound was made, and was a part of the accident, the accident was the sole and proximate cause of the death, though blood-poisoning ensued.² In an action on an accident policy to recover for the death of the insured caused by falling from a window, an instruction to the jury, that if the deceased got up in his sleep, and while asleep fell from the window, they should find for the company, was properly refused. Such an instruction excludes the idea that the deceased could possibly have gotten up in his sleep, have then awakened and again fallen to sleep. It was, therefore, calculated to mislead, by making the jury think, that, because the deceased might have gotten up in his sleep, and subsequently, and after having awakened, fallen out of the window while asleep, somnambulism was the proximate cause of the accident.³

§ 399. **Bodily infirmity—Disease.**—A company can not escape its liability under an accident policy on the ground that the insured, who was deaf, signed an application stating that he was not subject to any bodily infirmity, where it appears that its agent who took the application had full knowledge of the physical condition of the insured.⁴ Where an agent of an accident insurance society knows that a person has some bodily infirmity, but nevertheless solicits him to take out insurance, and recommends him as a proper person to be insured, these facts may be shown to rebut the presumption that the society was induced to take the risk by the representation in the application that the insured was not subject to any bodily

¹ *Peck v. Accident Association*, 52 377; 14 S. E. Rep. 923. The knowledge Hun 255; 23 N. Y. St. Rep. 465; see of the agent will be imputed to the Standard Life v. Thomas (Ky.), 17 company. 11 Am. & Eng. Enc. S. W. Rep. 275; *Martin v. Indemnity* Law, 323; *Fishbeck v. Ins. Co.*, 54 Co., 15 N. Y. Supp. 309; *Martin v. Cal.* 422; *Eggleson v. Ins. Co.*, 65 Association, 16 N. Y. Supp. 279. Iowa 308; 21 N. W. Rep. 652; *Ins. Co. v. Fish*, 71 Ill. 620; *Mullin v. Ins. Co.*,

² *Martin v. Association. supra.*

³ *Travelers' Ins. Co. v. Harvey*, 82 58 Vt. 113; 4 Atl. Rep. 817; *Shafer v. Ins. Co.*, 53 S. E. Rep. 553. Wis. 361; 10 N. W. Rep.

⁴ *Follette v. Association*, 110 N. C. 381; *Ins. Co. v. McCrea*, 8 Lea 513.

infirmity.¹ Near-sightedness is not a bodily infirmity.² An anaemic murmur, indicating no structural defect of the heart, but arising simply from a temporary debility or weakened condition of the body, is not a bodily infirmity within the meaning of a policy.³ A provision in an accident policy, stating that the risk shall not extend to death caused by bodily infirmities or disease, does not include fainting produced by indigestion or a lack of proper food, or any other cause which would show a mere temporary disturbance or enfeeblement.⁴ In an application for accident insurance, a warranty of freedom from bodily or mental infirmity does not extend to temporary debility. Vertigo or swimming in the head is not a bodily infirmity where the trouble is merely temporary, the result of indigestion, and does not affect the general health of the applicant.⁵

In his application for an accident policy the insured stated that he was not subject to fits, or any disorder which would render him liable to accidental injury. A few days after the policy was issued, the insured, on entering a store, tripped, fell against a stove, struck his forehead, and became unconscious for several minutes. He grew worse from day to day, became insane, and, a few days later, died. Afterward, in a suit on the policy, there was evidence that he had several times, before making the application, fallen or been thrown from his buggy and rendered unconscious, and that he had also several times fallen down, without apparent cause, trembling and acting strangely. Persons who had known him for many years testified that he was strong, robust and rugged in health, and that they had never known of his having any ailment. The jury found that he had made no misrepresentation as to his physical condition, and the court refused to disturb the finding.⁶ Where insured, while a boy, received injuries

¹ *Follette v. Association*, 107 N. C. 240, 12 S. E. Rep. 370, where the agent knew that the applicant was deaf; *Humphreys v. Association*, 139 Pa. St. 264, 20 Atl. Rep. 1047, where the agent knew that the applicant had but one eye.

² *Cotten v. Casualty Co.*, 41 Fed. Rep. 506.

³ *Manufacturers' Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

⁴ *Manufacturers' Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

⁵ *Mutual Benefit v. Daviess*, 87 Ky. 541; 9 S. W. Rep. 812.

⁶ *Brink v. Accident Association*, 7 N. Y. Supp. 847; see *Ins. Co. v. Francisco*, 17 Wall. 672.

from which he recovered so that they did not increase his liability to accidental injury, or contribute to the accident which resulted in his death, his policy was not forfeited by a statement in his application that he had never been physically injured, or subject to bodily or mental infirmity or disease; the insured being entitled to a liberal construction in his favor.¹ In a suit on an accident policy providing that the benefits should not extend to death caused by bodily infirmity or disease, it appeared that the insured suddenly fell, striking his head. There was no evidence of any external cause for the fall, and the uncontradicted testimony of the experts who conducted the post mortem showed that the heart and brain were generally diseased, and that this caused the fall and death. It was held that there could be no recovery.²

§ 400. **Loss of foot, eye or hand.**—One can not, under an accident policy, recover as for the loss of a foot, where, by reason of an injury to his back, he is deprived of the use of his leg, except when wearing an artificial support for his body.³ But he may, under such a policy, recover as for the loss of both feet, where by reason of an accidental injury his legs become permanently paralyzed and useless.⁴

§ 401. **Permanent or total disability.**—It is provided in the laws of some states that societies may be organized for the purpose of furnishing accident or permanent disability indemnity to members. The contracts of insurance issued by some societies stipulate that accident and permanent disability indemnity shall be paid according to their provisions, and under the provisions of the by-laws.⁵ There are few adjudicated cases on questions of permanent or total disability, and even these are not agreed upon the construction to be given to certain words and phrases used in most contracts of indem-

¹ *Standard Life v. Martin*, 133 Ind. 376; 33 N. East. Rep. 105; *Bancroft v. H. B. Association*, 120 N. Y. 14.

² *Sharpe v. Association (Ind.)*, 37 N. East. Rep. 353.

³ *Stever v. Association*, 150 Pa. 132; 24 Atl. Rep. 662.

⁴ *Sheanon v. Ins. Co.*, 77 Wis. 618; 46 N. W. Rep. 799; S. C., 83 Wis. 507; 53 N. W. Rep. 878. In this case the evidence was uncontradicted that

the paralysis of the legs and feet of the assured continued until his death, and that he was not able to stand up or use them after the injury. The action was commenced in his lifetime, and he died more than ninety days after the accident.

⁵ See *May on Insurance*, § 514 *et seq.*; *Bliss on Life Insurance*, § 702 *et seq.*

nity. A review of these cases will show very plainly the necessity of scrutinizing closely the exact language of the contract, as stress is sometimes laid upon the very form of the expression in which the contract is clothed. A policy which merely provides for indemnity for loss of time in a certain sum per week during the period of disability to work does not entitle the administrator of the insured to any damages in case of an accident causing the instantaneous death of the insured.¹ Where the contract states the occupation and classification of the insured, and provides for the payment of a certain sum per week for the "immediate, continuous and total loss of such business time as may result from accidental injuries," the words "loss of such business time" have reference to the occupation of the insured, and the loss of time in such business means the loss of time in the business of the insured.²

Under a policy insuring one against loss of time resulting from certain injuries "which shall, independently of all other causes, immediately, wholly and continuously disable him from transacting any and every kind of business pertaining to his occupation," the company is not liable for loss of time resulting from a physical injury, when it affirmatively appears that thirty days elapsed after the injury before he was so disabled that he could not attend to his business, and that during the thirty days he gave more or less attention to his business. The word "immediately" being preceded, by the words "independently of all other causes," is a word of time, and not of cause and effect, and the time which it indicates is not the same as that which would be indicated by the phrase "within a reasonable time."³

§ 402. **Permanent or total disability—Strict construction.**—A contract of insurance provided that, in case of accidental injuries which should "*wholly disable* and prevent him from the prosecution of *any and every kind* of business pertaining to his occupation," the insured should be indemnified against loss of time thereby "for such period of *continuous*

¹ Dawson v. Ins. Co., 38 Mo. App. 355. ³ Williams v. Association, 91 Ga. 698; 17 S. E. Rep. 982; but see American Accident Co. v. Norment, 91

² Pennington v. Ins. Co., 85 Iowa 468; 52 N. W. Rep. 482; see Bean v. Tenn. 1; 18 S. W. Rep. 395.

Ins. Co., 94 Cal. 581; 29 Pac. Rep. 1113.

total disability" as should immediately follow, not exceeding twenty-six weeks. In an action on this contract it was held that it was error to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent."¹ The constitution of a mutual benefit society provided that a member "permanently disabled from following his or her usual or other occupation" was entitled to a benefit, and in another section defined such disability as one which should "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood." In construing these provisions, it was held that the words "or other occupation" in the first mentioned section, could not be held to mean "or other of the same kind," and that the definition in the latter section was conclusive against one, who, disabled in his own trade, had been working at another totally dissimilar business; against

¹ *Saveland v. Fidelity, etc., Co.*, 67 Iowa 174; 30 N. W. Rep. 237. In this case the court said: "The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He can not repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy." In *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa 631, the language of the contract was that indemnity should be paid to the

assured, "while totally disabled and prevented from the transaction of all kinds of business," and it was held that such language could not be construed to mean "partially disabled from some kinds of business," that the assured could not recover, except upon proof of total disability, and that the rule would not be varied if he should be totally disabled in his own pursuit and able to engage in some other employment. In *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 71, it was held that there could be no recovery because it was not shown that there was a "total disability to labor," the language of the contract being, "accident and injury which totally disabled and prevented from all kinds of business." See *Hutchinson v. Supreme Tent*, 22 N. Y. Supp. 801; *Loveland v. Company*, 67 Wis. 174; *U. S. Association v. Millard*, 43 Ill. App. 148.

one who, being disabled from following the occupation of a barber, was able to run a restaurant, or clerk in a store.¹ The object of a society was to relieve its members while they were unable to work by reason of sickness or injury, and the constitution provided for benefits only for "total inability to labor" on the part of the member. It was held that this did not mean inability to labor at the same occupation, and that if the member was able to work at other employments, the benefits did not accrue.²

In a recent case³ it was said: "The policy upon its face describes the insured as 'by occupation, profession, or employment a leather-cutter and merchant.' It then provides, among other things, that 'if the insured shall sustain bodily injuries, * * * which shall * * * immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured,' then he is to be indemnified in the sum of \$15 per week. The policy then goes on to recite that 'he is insured under classification medium,' but that engaging in a more hazardous occupation will not wholly vitiate the policy, but, in such case, he shall receive only a proportionate compensation. On the back of the policy is a classification of risks, in which the 'preferred' class, which is most liberal in its indemnity to the insured, includes 'merchant,' and the 'medium' class, which provides for less indemnity, does not in terms include 'leather cutter.' The classification of risks upon the back of the policy can not have the effect to control the express stipulations on its face. The plaintiff was insured as a leather-cutter and merchant. He was described as having this twofold occupation. To be entitled to recover a weekly indemnity, he must be wholly disabled from the prosecution of any and every kind of business pertaining to the occupation under which he was insured; that is, the twofold occupation of leather-cutter and merchant. Such twofold occupations are not rare. Many kinds of business include buying and selling as well as manufacturing; the

¹ *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721. ³ *Ford v. U. S. Mutual Acc. Relief Co.*, 148 Mass. 153; 19 N. East. Rep.

² *B. & O. Relief Ass'n v. Post*, 122 169. Pa. St. 579; 15 Atl. Rep. 885.

whole being done by the same person. The fact that leather-cutting is more hazardous than the mercantile portion of the insured's business, undoubtedly served to fix the classification and the rate of indemnity, but can not control the provision in respect to the disability which shall entitle him to that indemnity. One of the appended provisions on the face of the policy is that he shall not be entitled to indemnity 'beyond the money value of his time.' His time during his disability may have been used by him as a merchant to greater profit than if he had continued at his occupation of leather-cutting. The meaning and purpose of the specification that he is insured under the 'medium' classification are not that his occupation is specified under that classification, for it is not; nor is the specification necessary to show the amount he is to receive in case of an accident resulting in death or temporary disability, for that has already been distinctly stated just before. But this specification derives its chief significance from the provision which follows, relating to his engaging in some occupation more hazardous than those enumerated in that classification. It does not do away with the statement that he is insured as a leather-cutter and merchant. On the whole, we are of the opinion that, to entitle the plaintiff to recover, he must show a disability both as a leather-cutter and as a merchant."

An accident policy insured against death or total disability resulting from bodily injuries effected through external, violent and accidental means. The "total disability" was defined as follows: "If said member shall sustain bodily injuries by means, as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership." Plaintiff in the contract stated his occupation to be that of a "retired," the term "gentleman" or the equivalent being evidently omitted by clerical error, and in an action on the policy testified that he had no occupation except to amuse himself, that his income was derived from investments, that he had a shop at his house, where he sometimes amused himself, was a director in a wagon company and at times used some of its machinery in connection with his amusement.

While operating a buzz-saw at the wagon-shops, he received a severe and painful wound on the back of the hand which deprived him of the use of it for some time. It was held that the injury was not covered by the policy, as plaintiff was not totally disabled, and prevented from any and every kind of business pertaining to his situation.¹

Provisions of the constitution and by-laws of a society granting benefits "in case of sickness," and providing that "when any member takes sick," he shall be entitled to such benefits "if it be so that he is not able to attend to his daily labor," do not extend to the case of a permanent bodily injury which does not affect the general health of the person injured.² A contract provided for benefits in case the insured should "fall sick, lame or blind, or be otherwise disabled from work." The proof showed that the insured was "unable to work by reason of natural decay," but it was held that incapacity to work arising from natural decay, as the result of old age, did not entitle him to benefits under the contract.³

§ 403. **Permanent or total disability—Liberal construction.**—Total disability from the prosecution of one's usual employment means inability to follow his usual occupation, business, or pursuits in the usual way. Though he may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he can not to some extent do all parts, and engage in all such employments.⁴ A contract provided that the assured should be indemnified, if he should receive injuries which should "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured." This was construed to mean, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his

¹ Knapp v. Association, 6 N. Y. Court of Mass.), 8 Law Reg. (N. S.) 233; Supp. 57. 1 Big. Life & Acc. Ins. Cas. 289. This

² Kelly v. Ancient Order of Hibernians, 9 Daly 289.

³ Dunkley v. Harrison, 56 Law Times Rep. 660.

⁴ May on Insurance, §§ 522, 523; Bliss on Insurance, § 403; Sawyer v. United States Casualty Co. (Superior

case does not seem to have been appealed. Hooper v. Ins. Co., 5 H. & N. (Exch.) 545; affirmed in the Exch. Ch. 6 H. & N. 839; S.C., 2 Big. L. & A. Cas. 573; Wolcott v. Association, 8

occupation, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. The court said: "He was not able to prosecute his business, unless he was able to do all the substantial acts necessary to be done in the prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform only one, he was as effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation. * * He was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business, but * it was sufficient if he satisfied (the jury) that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest as long as it was reasonably necessary to effectuate a speedy cure, so that a competent and skillful physician called to treat him would direct him so to do."¹ A policy provided that the company should be liable if the accident should "cause any bodily injury" to the insured, of "so serious a nature as wholly to disable him from following his usual business." The insured sprained his ankle, and though confined to his bedroom for some weeks by the injury, was at no time confined to his bed. He was a solicitor and registrar of a county court. He was not able to pass his accounts as registrar, nor to follow his usual occupation as a solicitor, but he read and gave directions to his clerks. The court held that he was wholly disabled within the meaning of the policy, since he was disabled from following his usual business in the usual way.² Under a by-law providing that if a member should become permanently disabled from following his "usual or some other occupation" he should be entitled to a certain benefit, a member who is disabled from following his usual employment is entitled to it, though he is not disabled from following some other occupation.³

¹ *Young v. Travelers' Ins. Co.*, 80 Me. 244; 13 Atl. Rep. 896; 6 N. Eng. Rep. 432.

² *Hooper v. Ins. Co.*, *supra*.

³ *Neill v. Order of United Friends*, 28 N. Y. Supp. 928. The court held that the expression "some other occupation" was not the equivalent of

On a policy for the payment of a certain sum weekly during total disability from accident, a physician is entitled to pay for a time when he was confined to his bed by an accident, though during that time he occasionally examined and prescribed for patients who came to his bedside, and at times without leaving his bed reached for or received certain medicines in his room, which he advised to be administered.¹

§ 404. An accident policy stipulated for the payment of a specified sum for disability incurred by the insured while engaged in his occupation as "an ice man, proprietor," provided his injuries produced total inability to attend to the employment or occupation in which he was engaged. The court construed the language above quoted, in which the occupation of the insured was described, to mean the proprietor of an ice business, in which he was a practical laboring man, engaged in the actual delivery of ice in his own behalf; and, as the evidence showed that the insured was not able, by reason of his personal injuries, to carry on the business of delivering ice, it was held that he was totally disabled within the meaning of the policy, although, notwithstanding his injuries, he was able to give general directions to a person who took his place as an ice man during the period of his disability.² A policy provided that if the insured should from violent and accidental injury suffer "the loss of two entire feet," he should be paid a certain sum of money, and it was held that where he was acci-

"all other occupations," and was of opinion that the language of the provision of the contract was chosen for the purpose of raising disputes as to the right of a beneficiary to recover, rather than to make plain the intent and meaning of the contract.

¹ *Wolcott v. Association*, 8 N. Y. Supp. 263. In its opinion the court said: "Total disability must, of the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how a person who labors with his hands would be totally disabled only when he can not labor at all.

But the same rule would not apply to the case of a professional man, whose duties require the activity of the brain, and which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go about his business, enter his office and make calls upon his patients, but is confined to the bed, as in this instance, and enabled only to exercise his mind on occasional applications to him for advice, he may be said to be totally disabled, within the meaning of the provisions of this policy."

² *Neafie v. Accident Indemnity Co.*, 8 N. Y. Supp. 202.

dentally shot in the back, and the injury produced total paralysis of the lower part of the body and entirely destroyed the use of both feet, he had suffered the loss of two entire feet within the meaning of the contract.¹ For the "total and permanent loss of the sight of both eyes" an accident insurance society agreed to pay a member one thousand dollars. Before taking the insurance he had lost the sight of one eye, and this fact was known to the society. Subsequently he lost the sight of the other eye. The court held that he was entitled to recover the amount of the policy.²

¹ Sheanon v. Ins. Co., 77 Wis. 618; 46 N. W. Rep. 799.

² Humphreys v. Association, 139 Pa. St. 264; 20 Atl. Rep. 1047. In passing upon the question of the liability of the society the court said: "It is evident the plaintiff was seeking insurance against the total and permanent loss of his sight. The company insured him against that or it did not insure him at all, which is not to be considered. There appears to have been no fraud or concealment practiced by the plaintiff upon the company, and we are not willing to believe that the latter took his premium without giving any insurance as regards his eyesight. The loss of one eye to him was precisely the same as the loss of both eyes by an ordinary man. It is total blindness in either case. There is no provision in the policy for the loss of one eye, as there is for the loss of one arm or one leg. The reason is plain. The loss of one eye does not produce a total and permanent loss of sight. For all practical purposes a man with one eye can still follow his occupation and gain his living, while the loss of an arm or leg is a disability which seriously interferes with his ability to earn his bread; hence it was that the policy provided, or rather defined the loss of sight as the loss of both eyes. It was the loss of sight which was insured against,

and this was just as complete in the plaintiff's case as though both eyes had been lost during the life of the policy. Assuming that the company intended to insure the plaintiff against something, and that that something was the loss of his sight, the most that can be said is that having but one eye the risk was increased; but the risk was not increased after the policy was issued. The general agent knew precisely what the risk was when he took it, and neither he nor the company can be now heard to aver that the risk was greater in the case of a man with one eye than of one with two. There can be no reasonable doubt that the plaintiff paid his premium, and accepted the policy under the belief that the words 'total and permanent loss of the sight of both eyes' were equivalent to the loss of eye-sight. He had a right to assume this in view of the fact that the policy was issued to him with knowledge on the part of the general agent that he had but one eye. * * Is it reasonable that the parties did not intend the policy to cover the matter of eye-sight at all? Yet this is the conclusion we must come to, if we sustain the defendant's contention. * * When the words are, without violence, susceptible of two interpretations, that which will sustain his claim, and cover the loss, must in preference be adopted."

A switchman on a railroad, by the loss of the fingers of one hand, is disabled, within a provision of the constitution of a society, stating that "a member who, by reason of a disability * * * becomes unable to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn a livelihood, shall be deemed entitled to disability benefits," and whether he can earn a livelihood by some other business is a question of fact for the jury.¹

A certificate of membership in an accident insurance association provided for relief for accident resulting in "total permanent" or "partial permanent" disablement, and there was no provision in the certificate itself for the payment of any benefits for an injury which resulted in partial disablement unless it was also of a permanent character. It was held that the liability of the company was not enlarged so as to embrace cases of merely partial disablement of a temporary character by an indorsement on a certificate, which provided that if the member shall sustain bodily injuries, whether partially or totally disabling, "by means as provided for in this certificate," the payment of the weekly relief should exonerate the company from all further liability, followed by a schedule designating different kinds of injuries, with a specified period of relief for each, and a statement that "injuries not included in the above schedule will be adjusted on their merits."² A contract stipulated for the payment of a certain sum "in case of total disability." Insured, an old man, was attacked with bronchitis and asthma, and the proof showed that he was permanently disabled from doing any manual labor. It was held that the disability was within the terms of the contract.³ The fact that the insured could pursue his usual occupation by wearing a mechanical appliance will not lessen the character of the disability as a total one, when the use of the appliance would endanger his life, or would subject him to intolerable discomfort.⁴

§ 405. A clause in an application for mutual accident indemnity, agreeing that the benefits to which the applicant

¹ *Hutchinson v. Supreme Tent*, 22 N. Y. Supp. 801.

³ *Dodds v. Aid Association*, 19 Ontario Repts. 70.

² *Hollobaugh v. Association*, 138 Pa. St. 595; 22 Atl. Rep. 29.

⁴ *McMahon v. Supreme Council*, 54 Mo. App. 468.

shall become entitled, shall be governed and paid in the same ratio that his income shall bear to the amount of indemnity insured, is binding on the insured, though the agent of the society, by false statements as to the income of the insured, has placed him in a higher class, paying larger premiums.¹

§ 406. **A company may be liable for sick benefits, though not liable for the death of the insured—Death within ninety days.**—A policy dated October 5, 1866, “for the period of twelve months” was made “against loss of life” of the insured, in a sum payable to his widow on proof “that the assured at any time after the date hereof, and before the expiration of this policy, shall have sustained personal injury caused by any accident,” “and such injuries shall occasion death within ninety days from the happening thereof.” By an accident which happened on December 11, 1866, the insured had his arm crushed, and he continued to be absolutely and totally disabled from the prosecution of his usual employment until March 12, 1867, when he died from the results of the injury. It was held that by no method of computation of time could the death be regarded as occurring within ninety days from the happening of the accident; that when time is computed from an act done, the general rule is, to include the day, but when it is computed from the day of the act done, the day is excluded; that the language of the policy required that the computation be made from the time of the act done, namely, the accident.”² The policy further insured “against personal injury, in the sum of \$10 per week, for a period not exceeding altogether twenty-six weeks for any single accident, within the meaning of this policy and the conditions hereto annexed, by which the assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment.” An action was brought to recover \$130, being \$10 a week for each of thirteen weeks during which the insured was absolutely and totally disabled from the prosecution of his usual employment. The defendants admitted that the plaintiff was entitled to recover unless the fact that the accident was fatal constituted a defense. The court held that the policy

¹ Howe v. Society, 7 Ind. App. 586; ² Perry v. Provident Life, 99 Mass. 34 N. East. Rep. 830.

covered two classes of injuries, namely, those which occasioned loss of life within ninety days, and those which should not be fatal; that the two provisions should be construed together; that the evident intent was, that, if an injury happened within the meaning of the policy, it was insured against as coming within one class or the other; that, if it was otherwise construed, an injury which should not prove fatal within ninety days would furnish no ground of action until it should be made to appear that it would never prove fatal, and this would render the insurance nugatory in such cases.¹ In an action on an accident policy, which provided for payment for death only when the death occurred within ninety days after the accident, it was shown that the death occurred on June 26th, and the accident occurred either on March 23d or March 30th. Before the insured's death, his wife, who was the beneficiary under the policy, had written to the company to claim indemnity for loss of time. In this letter she stated that the accident occurred on March 23d. The accident did not incapacitate the insured from labor until fully a week after it occurred. It was held that the letter did not conclude the beneficiary from showing that the injury was received on March 30th.²

¹ *Perry v. Provident Life*, 103 Mass. 242; S. C., 2 Big. L. & A. Cas. 71.

² *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; 18 S. W. Rep.

CHAPTER XXX.

ACCIDENT INSURANCE.

- § 407, 408. Occupation of the insured.
- 409, 410. Change of occupation.
- 411-414. Change of occupation; classified risks.
- 415-418. Notice of injury or death.
- 419. Waiver of notice.
- 420. Payment of claim from a special fund or in a special manner.

§ 407. **Occupation of the insured.**—The occupation of the applicant for insurance is a fact material to the risk, and, when he is asked to state his occupation, he must do so with substantial accuracy.¹ The occupation of the applicant to be disclosed in his answer is that in which he is engaged at the time of effecting the insurance;² but this rule does not cover mere temporary suspension of the general occupation.³ When a society desires to protect itself from all liability, except for

¹ *Dwight v. Ins. Co.*, 103 N. Y. 341; see *Virginia Ins. Co. v. Buck*, 88 Va. Hartman *v. Ins. Co.*, 21 Pa. St. 466; 517; 13 S. E. Rep. 973; *Holland v. Grattan v. Ins. Co.*, 80 N. Y. 281; Supreme Council, 54 N. J. L. 490; 25 *Kenyon v. Ins. Co.*, 122 N. Y. 247; Atl. Rep. 367.

United Brethren v. White, 100 Pa. 3 In *Mowry v. Ins. Co.*, 7 Daly, St. 12; *Holland v. Chosen Friends*, 54 (N. Y.) 321, the applicant answered that he was manufacturing. It was held that a breach was not shown by proof that he was at that time keeping a billiard saloon, when he had for years previous been a manufacturer of soda water, and was about to resume that business. The court laid stress upon the fact that the term "manufacturer" was very vague and conveyed no definite idea of his occupation, and said that if the *present* occupation of the applicant had been asked for the breach would have been

Where true occupation is known to agent and misrepresented by him to the company, the latter is bound. See *Wright v. Ins. Co.*, 91 Ky. 208.

² *Hartman v. Ins. Co.*, *supra*; *United Brethren v. White*, *supra*; undoubted. *Provident Life v. Fennell*, 49 Ill. 180;

accidents occurring in a particular occupation, or when it desires to protect itself from liability for accidents occurring in certain occupations, it must expressly so stipulate in the contract of insurance. If the society insures against accidents generally, and does not provide that the insured may not change his occupation, a change in his occupation, whether affecting the risk or not, does not avoid the policy. Under such a contract of insurance, it is immaterial that the insured was a "switchman" when the contract was entered into, and was killed while in the performance of the duties of a "brake-man."¹ The mere statement as to his occupation, made by an applicant for insurance, is a representation of a fact as it then exists, but it does not amount to a contract that he will do no act not connected with such occupation, or that he will not engage in any different one.² Where the by-laws of a society contain nothing in regard to a change of occupation by a member, do not state the effect which shall follow his engaging in a more hazardous occupation than that in which he was engaged when he became a member, but merely state that in order to become a member, an applicant must be engaged in a lawful occupation which is not hazardous, it may not be said that hazardous occupations are forbidden by necessary implication, and that a forfeiture of membership must, therefore, follow the adoption of such an occupation. Conditions of forfeiture must be set out in terms, and are never extended by construction.³ Where certain occupations are classed as non-insurable by an accident insurance company, a certain alleged trade or occupation, not mentioned in the manual of classification prepared and adopted by it, is not classed as non-insurable.⁴

§ 408. It is a matter of common observation that in large cities men work in special branches of certain trades, while in smaller places, a man in a certain trade works in the several branches. In a city a man may be a shingler, a lather, or a stairbuilder, and may do no other carpenter's work, while a

¹ *Provident Life Ins. Co. v. Fennell*, 47 N. W. Rep. 983; *Sanford v. Association*, 63 Cal. 548; see § 166. 49 Ill. 180.

² *Provident Life v. Fennell*, *supra*; ⁴ *Wilson v. Association*, 53 Minn. *Provident Life v. Martin*, 32 Md. 310. 470; 55 N. W. Rep. 626.

³ *Hobbs v. Association*, 82 Iowa 107;

carpenter ordinarily shingles roofs, puts on laths and builds stairs. It is usually a mason's work to point up and finish brick walls, though, in cities, there are men who do only the work of pointing and finishing walls of large and elegant buildings. Where the classification prepared and adopted by the accident company does not divide these several branches into separate occupations or trades, a recovery can not be defeated, in a suit on a policy, because the insured voluntarily exposed himself to the dangers incident to work in a special branch of his trade.¹ Where a person is insured in a certain class or occupation, the company assumes the risk of accidents to him from the dangers incident to such class or occupation. Voluntary exposure to such incident dangers is contemplated by both parties to the contract.² A person who is classified and insured under an accident policy, in a certain occupation, may rightfully do whatever is customary, under like circumstances, among reasonable, prudent persons of like occupation; and in an action on the policy for injuries received in his occupation, it is not prejudicial error to permit him to show what is common practice among persons in that occupation.³ When an application for accident insurance states that the applicant is a conductor on a passenger train, and contains nothing indicating that the policy will have any restrictions against entering and leaving moving trains, such risks will be held to be insured against; and if an action is brought on the contract made by the application and its acceptance, recovery may be had for an accident caused by such risk, though it is excluded by the policy. Where, however, action is brought on the policy, and the accident, though alleged not to have happened from such risk, is shown to have been so caused, recovery can not be had under the pleadings.⁴

A policy of life insurance, conditioned that the insured should not, without the written consent of the insurers first obtained, engage in any sea service, had annexed to it a per-

¹ Wilson v. Association, *supra*.

⁴ Dailey v. Preferred Masonic (Mich.

² See Dailey v. Preferred Masonic 57 N. W. Rep. 184. In this case, though the contract was complete (Mich.), 57 N. W. Rep. 184.

³ Pacific Mutual v. Snowden, 58 Fed. Rep. 342; Wilson v. Association, 114 Ill. 533; 2 N. East. Rep. 414. and the policy forwarded by mail, it did not reach its destination until after the death of the insured member.

mit to engage in sea service on "the prior payment any year of an additional premium." The insured paid the first additional premium and continued in sea service for more than a year without payment of another additional premium. It was held that the policy was forfeited.¹ A policy stipulated that it was to be void "as to all accidents occurring in any occupation, profession, or employment or exposure not named, or incident to the occupation under which he receives membership." The insured, who stated his occupation to be that of a retired gentleman, was injured while operating a buzz saw for his own amusement. It was held that the operation of the buzz saw was not incident to the occupation or condition of a retired gentleman.² An applicant stated that his occupation was that of a "livery stable proprietor (not working)," and that his duties were "such as were required of him in that occupation." The evidence showed that he hired men to do the work about his stable, though he sometimes hitched up a horse, and drove persons out. It was held that this statement of his duties sufficiently apprised the company of their character, and that, if anything more definite was required, it was the duty of the company to ascertain the facts by proper inquiry.³ An accident policy contained the following condition: "This insurance does not cover entering, or trying to enter or leave, a moving conveyance using steam as motive power; * * * railroad employees excepted." Assured was baggage checker of a transfer company. His business required him to meet and board incoming trains, and check baggage to other railroad lines, and to residences in the city. It was held that assured was a railroad employe, within the meaning of the foregoing exception. The words of such an exception have reference to the character of employment, rather than to the corporation who is the employer.⁴ The term "supervising farmer," in the classification of risks, covers a person who employs farm laborers and does but little work himself.⁵ The

¹ Ayer v. N. Eng. Mutual, 109 Mass. 430.

⁴ Cotten v. Casualty Co., 41 Fed. Rep. 506.

² Knapp v. Association, 6 N. Y. Supp. 57.

⁵ National Accident Soc. v. Taylor, 42 Ill. App. 97.

³ Brink v. Accident Association, 7 N. Y. Supp. 847.

jury were warranted in finding that insured was not "a grocer delivering goods, by occupation," so as to reduce his maximum death indemnity under the policy, when there was evidence that, though insured occasionally delivered goods, his son delivered the most of them.¹ The word "occupation," as used in accident policies, must be held to have reference to the vocation, profession, trade or calling in which the assured is engaged for hire, or for profit, and the statement of his occupation by the insured does not preclude him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations.²

§ 409. **Change of occupation.**—A change of occupation means "an engaging in another employment as a usual business." It does not apply to temporary employments during leisure hours, to acts done outside of one's usual and ordinary business, or to casual employment in a different business. A teacher out of employment, who builds one or two houses by contract, and superintends them, does not thereby change his occupation and become a builder.³ And an engineer who leaves his cab on a locomotive engine to perform the duty of a brakeman, while his train is in motion, does not thereby change his occupation.⁴ In his application assured stated his occupation to be an "earthenware manufacturer." There was no evidence that he had changed his occupation, but the proof was that, while on a visit at a farm, he had assisted in loading hay, and in so doing had received his fatal injury. It was held, that there had been no change of occupation within the meaning of the policy.⁵ A farmer, living on the shore of Lake Ontario, was insured as a farmer. A schooner was driven aground, about one hundred rods from the shore, by a storm. A flag of distress was exhibited, and the insured, who lived near, went with his neighbors to rescue the crew, consisting of eight men and one woman. In so doing he was drowned. The policy provided that the liability should not extend to any injuries received by the insured "while em-

¹ Hall v. Am. Acc. Association, 86 Wis. 518; 57 N. W. Rep. 366.

⁴ Provident Life v. Martin, 32 Md. 310.

² Union Mutual v. Frohard, 134 Ill. 228.

⁵ N. A. Life v. Burroughs, 69 Pa. St. 43.

³ Adm'rs of Stone v. Casualty Co., 34 N. J. L. (5th Vroom) 371.

ployed in wrecking." The court said: "He was a farmer and not, by occupation, a wrecker. As well might a farmer who should be smothered in attempting to rescue his neighbors from their burning dwelling be called a fireman as this man a wrecker."¹ A land owner building a bridge on his farm can not be said to have changed his occupation from that of a farmer to that of a bridge builder, and a person driving a post by means of an axe or sledge is not engaged in the occupation of a pile driver.² A farmer does not change his occupation by acting temporarily as superintendent of police at a state fair.³

An accident policy, providing for the payment of a specified sum for disability incurred while engaged in his occupation as "an ice man, proprietor," covers accidents occurring to the insured, who is the proprietor of an ice business, while engaged in the delivery of ice, though the rules of the company provide that a proprietor may insure at a fixed rate, while one delivering ice can not receive so large a weekly sum.⁴

¹ *Tucker v. Ins. Co.*, 50 Hun 50; 4 N. Y. Supp. 505; 23 N. Y. St. Reptr. 957.

² *National Accident Soc. v. Taylor*, 42 Ill. App. 97.

³ *Travelers' Association v. Kelsey*, 46 Ill. App. 371.

⁴ *Neafie v. Accident Indemnity Co.*, 8 N. Y. Supp. 202; 55 Hun 111. This decision is placed upon the exact terms of the statement of the occupation of the insured. The court said: "The expression which is used in the policy is not that of a mere proprietor, who conducts a general ice business by advices from his office, but on the contrary, it was that of an ice man, or a man who might be a deliverer of ice, and who was at the same time the owner or proprietor of such business. The plaintiff received the injuries while engaged in the manual duties pertaining to the delivery of ice to his customers. The circumstance that he was the proprietor is important only as showing the value of his time,

and his ability to earn moneys. The weekly payments provided for by the policy are graduated according to the ability of the party insured to earn money in his employment, or occupation or profession. There is a provision in the policy that if a person receives an injury while engaged temporarily or otherwise in an occupation or employment classified as more hazardous than the one stated in his application indemnity shall be afforded only at the rate provided for the occupation or employment in which the injury is received. No partial defense is available to the defendant under this provision for the reason that our construction of the language above quoted is that the occupation or employment of the plaintiff as an ice man, adding the words 'as proprietor,' did not describe him as only engaged in the management of a business, but was broad enough to include a practical and laboring man, engaged in the actual delivery of ice in his own be-

§ 410. Verbal testimony is not admissible to prove an agreement on the part of an applicant for insurance that he would not act in certain capacities and in certain lines of labor, when the written contract does not embody such an agreement. Evidence of a verbal agreement pertaining to the subject-matter of a written contract, made before or at the time of the execution of the written contract, and not embraced therein, is not admissible for the purpose of restricting, enlarging, or in any way varying the terms of the written contract, and this rule applies as well to an insurance contract as to any other.¹ An applicant having stated his occupation to be that of "machinist and railroader," and it being so written down in the application, the fact that he agreed to strike out the word "railroader" is not a defense to an action on the policy, as this was not equivalent to an agreement not to act as brakeman on a railroad, and the striking out of the word "railroader" could not have obliterated the knowledge of the company that the applicant was acting as a brakeman.²

§ 411. **Change of occupation—Classified risks.**—It is competent for the parties to a contract of accident insurance to agree that if the insured shall be injured in any occupation rated by the association as more hazardous than that given by the insured as his occupation, his insurance shall only be as much as the premium paid will purchase at the rate fixed by the association in its tables for such increased hazard. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed, and it is proper for an association to provide against an increase of risk after the issuing of its contract.³

The following provision was in the body of a certificate: "If the insured member be fatally injured, while doing

half. Had he not been actually the proprietor of his own business, then, doubtless, the policy would not have provided any payment to him above five dollars a week, placing him in a class of mere laborers."

¹ Insurance Co. v. Mowry, 96 U. S. 544; White v. Ashton, 51 N. Y. 280; White v. Walker, 31 Ill. 422; National Mutual v. Heckman, 86 Ky. 254.

² National Association v. Heckman, 86 Ky. 254; see Wright's Adm'r v. Ins. Co., 91 Ky. 208; 15 S. W. Rep. 242.

³ Standard Life v. Martin, 133 Ind. 376; 33 N. East. Rep. 105; Aldrich v. Association, 149 Mass. 457; 21 N. East. Rep. 873.

or performing any act or thing pertaining to an occupation classed by this association as more hazardous than the occupation under which this certificate is issued, the insured member, or his beneficiary, as the case may be, shall be entitled only to the indemnity of the class in which such more hazardous occupation is classified by this association." The member was insured as a stationary engineer in class 3. The occupation of a wood-chopper was placed in class 5, and rated as more hazardous. While chopping wood for his own use in a place made slippery by the sleet and hail which had fallen, the insured slipped, fell across a log and immediately died. It was claimed by the society that the insured was fatally injured while doing an act pertaining to an occupation classed by it as more hazardous than the occupation under which the certificate was issued, and that the indemnity of the class in which such more hazardous occupation was classified was all that could be recovered. The court instructed the jury to determine from the evidence whether, under the circumstances, and within the terms of the policy, at the time of his death, the insured was engaged temporarily in an occupation more hazardous than that of a stationary engineer, but it did not submit to the jury the distinct question to be determined, whether the insured was fatally injured while performing an act peculiarly embraced in the occupation of a wood-chopper, and not in that of a stationary engineer. A new trial was granted for the reason that, while it might be difficult, in many cases, to say what acts or things are properly incident to one occupation, which are not so to any other, still it should have been submitted to the jury to determine from the evidence, whether the act or thing which the insured was doing or performing at the time of his death more properly pertained to the business of a wood-chopper, and did not belong to his own occupation.¹

A certificate of membership permitted an employment different from that designated as the regular or usual employment of the assured, in his application and certificate. If injured while thus engaged, temporarily or otherwise, in an employment classified by the association as more hazardous than the one thus stated as the regular employment of the

¹ Eggenberger v. Association, 41 Fed. Rep. 172.

assured, the indemnity to be paid, in case of death, was to be at the rate specified for the occupation in which he was, at the time of the injury, actually engaged. In his application the insured had been asked to state his occupation; "if more than one, state them all; state your duties." His answer was, "spare conductor, through freight." The society classified the employments of conductors and brakemen at different rates. In case of the accidental death of a brakeman, his beneficiary was entitled to \$250, while the beneficiary of a conductor would be entitled to \$2,000. The society had not classified the occupation of a "spare conductor," nor determined what indemnity the death of a member, while engaged in that occupation, should entitle the beneficiary to receive. The insured was killed while performing the duties and doing the work of a brakeman on a mixed through train, under the direction of another person as conductor. The evidence showed that the duties of a spare conductor were to do anything and go anywhere on any train at any time and in any capacity. It was contended that the assured was legitimately within his duty as a spare conductor when killed, although actually doing the work and incurring the hazards of a brakeman. No general use of the term in this sense was shown, nor did it appear that the society had any knowledge that it was so used upon the road where the insured was employed. The court said: "The defendant must have insured him according to the meaning of those words as ordinarily understood. When insured as a conductor on a freight train, it was to be inferred that his duties were those of a conductor. The adjective "spare," in its ordinary lexical sense, would mean "supernumerary," or "held in reserve;" "to be used in an emergency." Worcester, Lex. Webster, Lex. It would properly distinguish one occasionally from one regularly and continuously employed. The word gave no intimation that he was engaged, or desired to be insured, in the performance of any other duties than those of a conductor. When words, having an established place in the language, are employed and apparently used in no technical or peculiar sense, they must be construed according to their use as established.¹ The defendant was not obliged to inquire what sense the applicant attributed to the word "spare" in the

¹ *Odiorne v. Insurance Co.*, 101 Mass. 551.

connection in which he used it. It was for him to have defined it, if that sense was unusual. Where there had been a classification of the various employments in which the insured was engaged, the defendant could not suppose that he sought to be insured except as a conductor, or that by this word he sought to embrace the otherwise distinct employments. The insured having been actually engaged as brakeman when he was killed, the beneficiary is therefore entitled to recover only the sum of \$250.¹ The constitution of a corporation organized to afford relief to employes of certain railroad companies provided relief to those injured "by accidents while in the discharge of duty, and in the service of" the companies. It was held that an employe who fifteen minutes after having quit work for the day, and while going home from work, in crossing the railroad tracks, was killed by cars, was in discharge of his duty, and in the service of the company, within the meaning of the constitution.² A person who is insured against accidents while in the discharge of certain duties must, if the policy so provides, use due diligence for his personal safety while in the discharge of those duties.³

§ 412. A policy contained a stipulation that it should not cover accidents, injuries or death from trying to enter a moving steam vehicle, this provision, however, not being applicable to railway employes. The insured, a banker, was killed while attempting to get on a moving railway train. Another provision of the policy limited the liability of the company to a less sum than that named in the policy, if the insured should be injured in any occupation or exposure classed as more hazardous than that specified in the policy, and it was claimed that a recovery should be allowed for such smaller sum. The court said: "The terms 'occupation or exposure classed by this company as more hazardous,' etc., refer, as we understand, to distinct, classified occupations or employments, such as railroad conductors, railroad brakemen, railroad engineers, blacksmiths, carpenters, etc. To bring a case within the provision limiting the liability of the company to a less amount than that named

¹ Aldrich v. Accident Association, 149 Mass. 457; 21 N. East. 873.

² Standard Life v. Jones, 94 Ala. 434; 10 So. Rep. 530.

³ Kinney v. B. & O. Association, 35 W. Va. 385; 14 S. E. Rep. 8.

in the policy the assured must be within one of such classes; that is, engaged in one of the more hazardous occupations. * * The construction which the appellants would have us put upon this provision would render of no effect the more plain condition of this contract; that this insurance does not cover accident nor death or injury resulting * from * entering, or trying to enter, or leaving a moving steam vehicle.”¹ A slave whose life was insured was a laborer in a tobacco warehouse, and the policy stipulated that he was not to be employed in a more hazardous occupation. He was subsequently drowned in a river by falling from a plank while walking on it from a steamboat to the shore, having been sent by his master to be employed on a sugar plantation. The company was held liable, and the court based its opinion upon the following ground: “Conceding that a sugar plantation is a more hazardous employment than tobacco warehouses, still, the slave was not lost whilst working thereupon. He had not reached the plantation. If plaintiff had not had the intention of employing him upon a plantation, but had been taking the slave at the time of his death to work in a tobacco warehouse in Virginia, there could then be no doubt of the liability of the defendant. The intention to employ him on a sugar plantation was not the cause of his death; but a strong wind which caused him to lose his balance and fall in the water in passing on a plank from the steamer to the shore. * * There is nothing in the policy which liberates the defendant from liability on account of the intentions that plaintiff might entertain during the existence of the policy of violating its terms.”²

§ 413. An accident policy was indorsed with the following stipulation: “Policy holders insured under the preferred class will not be entitled to recover for injuries received in any employment or by any exposure either more hazardous in itself, or classified by the company as more hazardous than the occupations named in the preferred class.” In construing this indorsement it was held that it had reference to hazardous employments, and not to individual acts incident to other occupations, and further that, being an indorsement not re-

¹ *Miller v. Ins. Co.*, 39 Minn. 548; ² *Summers v. Ins. Co.*, 13 La. Ann. 40 N. W. Rep. 839. 504.

ferred to in the body of the policy, it was no part of the contract.¹

¹ Adm'rs of Stone v. Casualty Co., 34 N. J. Law (5 Vroom) 371. The court said: "The injuries excluded from the compensation of the policy are described as those that are 'received in any employment, or by any exposure, either more hazardous in itself, or classified by the company as more hazardous.' These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to employments and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure,' but, looking at the body of the policy we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood, in this view, they are properly a part of the classification, but if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy it was easy for them to do so in plain language. Such a stipulation would

obviously be one of a very important character, and we would expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous, it is the fault of the defendants; it is their contract, and the construction of it must be strongly against them, *contra proferentes*. Nor do I think the liberal interpretation of this clause, which the defense contends for, a practical one. It would be difficult to put it in practice; for who can say, in many cases, what acts are properly incident to one occupation, and which are not so to any other? The subdivisions of employments are so numerous and minute, that in actual life it is impossible to separate them by any visible and exact line; for instance, in the first of these classifications the shop-keeper is placed, and in the second the laborer. The employments of these are distinct; but with respect to particular acts it would be extremely difficult, if not impossible, to classify them into those which are common to both occupations, and into those which are peculiar to each. It does not seem to me proper to bring into this agreement this confusion and uncertainty by construction. It certainly is not necessary for the reasonable protection of the company, for there are other restrictions in this instrument which are, apparently, sufficient to debar a party insured from doing acts appertaining to other occupations, which are of a particularly hazardous nature. I refer to the clauses referring to undue exposure. Even the

A by-law of a society provided: "Any member, who shall change his occupation to any other more hazardous than the one in which he was classified when insured, shall immediately notify the secretary of such change; and any member, receiving an injury while engaged temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary, shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury." The certificate issued to a member contained this clause: "It is expressly stipulated and agreed, that in the event of the member being either fatally injured, or otherwise disabled while engaged temporarily, or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association, then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury." It was provided in the classification of risks that, in the event of the death by accident of a member in division A, a sum not exceeding \$5,000 should be paid and that, in the event of such death of a member of division E, which was designated therein as "hazardous" a sum not ex-

case put of an attorney driving a steam engine would probably come within this prohibition. But there is still another, and, as it seems to me, a decided objection against the admission of this indorsement, as constituting in itself a substantive agreement. That objection is this: That considered in this light it can not be received as any part of the contract between these parties. As I have stated, this clause is a prefix to the classification on the back of the policy, and such prefix is not referred to in the body of the instrument. The policy itself is very explicit as to what shall be comprised in the contract. Its language is, that this policy 'is issued and accepted subject to all the provisions, conditions, limitations and exceptions herein contained or referred to, and upon the express agreement that the statements and declarations of the insured in his application for this insurance are warranted to be true in all respects, and that said application, together with the company's classification of hazards indorsed hereon are referred to, and made a part of this contract.' This specification of the parts going to make up the agreement is clear, and it does not embrace this prefix in question, if such prefix is to be taken as a modification of the body of the policy in a most material respect. On these various grounds I incline to the view that the indorsement in question does not constitute a substantive stipulation, but is merely explanatory of the stipulations to the extent already indicated."

ceeding \$1,000 should be paid. Merchants were placed in division A, and hunters in division E.

The facts and the decision of the court in a case arising under this contract can not be better stated than in the language of the opinion. This was as follows: "The principal contention of appellant is that the deceased was killed while engaged temporarily in an act or occupation classed as more hazardous than the one in which he was accepted, and that appellee is therefore entitled to recover only the amount provided for such hazardous risk and occupation. The contention of appellee is that there was no change of occupation, within the meaning of the by-laws and certificate of insurance. The deceased was a hardware merchant. He did not follow the occupation of a hunter for hire or profit. He was killed while engaged in the act of hunting as a recreation, and it does not appear that he had hunted with a gun on any occasion since the issuance of the policy other than that upon which the accident occurred. In our examination of the provisions of the by-laws and contract of insurance, we will first ascertain the proper construction to be placed upon the former. The language, as we have heretofore seen, is: 'Any member receiving an injury while engaged temporarily, or otherwise, in an occupation more hazardous than the one in which he was engaged when insured,' etc. 'Occupation' is defined by lexicographers to mean 'that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade.' The classification of hazards in the by-laws is made upon the basis of occupations. Merchants, and those following other like vocations, are placed in division A; grain-measurers and others in division B; paper-hangers and others in division C; teamsters and others in division D; and boatmen and others in division E. The by-laws in question must receive a reasonable construction. It would be unreasonable and absurd to hold that the merchant, who at one time measured a few bushels of grain, at another hung a few rolls of wall-paper upon his own premises, at another drove a team of horses in a carriage or wagon, and at still another rowed a skiff for exercise or recreation, became, within the true intent and meaning of these by-laws, at these several times, a grain measurer, a paper-hanger, a teamster, and a

boatman, respectively. The word 'occupation,' as found in these by-laws, must be held to have reference to the vocation, profession, trade, or calling, which the assured is engaged in for hire, or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations; or from engaging in mere acts of exercise, diversion, or recreation. This view is not subversive to the word 'temporarily,' found in said section, for there would be full opportunity for giving force and effect to it, in the event that a professional man, merchant, or person in some other calling, should temporarily abandon such vocation, and for purposes of profit, or as a means of gaining a subsistence, temporarily employ himself in some more hazardous occupation. This construction of these by-laws seems to be sustained by the authorities.¹

* * It is urged, however, that the contract of insurance contains the words 'in any act or occupation,' instead of the mere words, 'in another occupation,' found in the by-law, and that the words, 'while engaged temporarily, or otherwise, in an act,' can not be ignored; but that they have a definite and clear meaning, and must be given legal force and effect. It is to be noted that the words used in the contract are words selected and used by the corporation itself, and are therefore to be interpreted most strongly against it; or that, at all events, they are to be construed according to their common and literal meaning in favor of the insured. The provision of the policy, upon which is based the claim that the demand of appellee is reduced from one under division A to one under division E, is not simply that if deceased was fatally injured 'while engaged temporarily, or otherwise, in any act or occupation more hazardous than the one in which he was accepted,' but contains the further requirement that the 'act or occupation' that will be effective to work such reduction must be one that is 'classed as more hazardous, * * according to the classification given by the rates and by-laws of the association.' These words last quoted are words of limitation, pertaining to, and qualifying, the terms, 'any act,' and 'occupa-

¹ Citing *N. A. Life v. Burroughs*, v. Ins. Co., 39 Minn. 548; 40 N. W. 69 Pa. St. 43; *Stone's Adm'rs v. Cas-* Rep. 839.
uality Co., 34 N. J. Law 375; *Miller*

tion,' as used in the contract. We have already seen that the classification of hazards made in the by-laws is predicated only upon occupations. There is not in the by-laws, or in the record any classification of hazards in respect to acts. In other words, there is no act which is classified as more or less hazardous than another, and no act which is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased. The case, then, does not stand otherwise than it would if the word 'act' were not found in the contract. The courts below properly held that the claim of appellee was under division A, and was for \$5,000."¹

§ 414. Where an applicant for insurance against accidents makes a true and full statement of his occupation to the agent of the company, the company is bound, after loss, by the classification which the agent gives him; and if he is wrongly classified, according to the rules of the company, the fact that he certifies to his understanding of its classification of risks, and that he belongs to the class given, is immaterial, when in fact his only means of understanding the classification is through the representations of the agent.² Where an accident company, with knowledge that the insured was ordinarily a jobber and contractor, though sometimes a farm-hand, classifies him in its policy as a jobber and contractor, it can not, after he has been injured while working as a farm hand, reduce his indemnity to the grade in which farm hands are classified. A company can not after the insured has been injured, classify the occupation in which he was injured in a grade other than that specified in the policy, and thus reduce his indemnity to a lower rate of payment.³ Where one is classified, for the purpose of discriminating employments more or less hazardous and fixing insurance rates in proportion to the hazard, as a "capitalist by occupation," he is not classed as a capitalist, but is insured in a preferred class as a capitalist

¹ Union Mutual v. Frohard, 134 Ill. Co., 94 U. S. 621; Ins. Co. v. Mahone, 228; 25 N. East. Rep. 642. 21 Wall. 152; N. Y. Acc. Co. v. Clayton, 59 Fed. Rep. 559.

² Pacific Mutual v. Snowden, 58 Fed. Rep. 342; see 2 Amer. Lead. Cas. (5th Ed.) 917; Ins. Co. v. Wilkinson, 13 Wall. 222, 235, 236; Eames v. Ins. ³ Bushaw v. Accident Co., 8 N. Y. Supp. 423.

by occupation.¹ Where a member continues to pay his assessments for more than three years after receiving notice that the classification of his membership has been changed, the contract can not be rescinded on account of the change, but it will be held that he assented to it.²

§ 415. **Notice of injury or death.**—Accident policies usually provide that notice of an injury shall be given to the company or to its local agent within a certain specified time, and such notice is almost always required as a condition precedent to the right to demand payment. When the time is specified within which the notice must be given to hold the company on its contract, it must be given within that time, for the insurers have a right to impose such a condition, in order to investigate at an early moment the nature of the injury and the circumstances under which it occurred, in order to judge of the validity of the claim. Where such a stipulation has neither been complied with nor waived, the insured can not recover on the policy.³ A provision in a policy of insurance prescribing a limit of time within which notice of death or injury is to be given, will not be construed as a cause of forfeiture where it is not expressly so stipulated in the contract. A policy providing that notice of injury shall be given within twenty-four hours after it occurs, but providing no penalty or forfeiture for failure to give such notice, may be recovered on, if notice is given within a reasonable time after the injury occurs.⁴ But, in such case, notice must be given within a reasonable time, though provisions for forfeiture are not embodied in the policy.⁵ Unless it is expressly so stipulated in the contract, the notice need not be in writing;⁶ nor need any particular form of notice be used, if the fact to be made known is clearly set forth.⁷ Where the insured is the only person interested, he is the proper one to give the notice, but he may

¹ Bean v. Ins. Co., 94 Cal. 581; 29 Pac. Rep. 1113.

² Margut v. United Brethren, 148 Pa. St. 185; 23 Atl. Rep. 896.

³ Davis v. Davis, 49 Me. 282; Heywood v. Association, 85 Me. 289; 27 Atl. Rep. 154.

⁴ Coventry Mutual v. Evans, 102 Pa. St. 281.

⁵ Woodfin v. Ins. Co., 41 N. C. (6 Jones, Law,) 558.

⁶ Killips v. Ins. Co., 28 Wis. 472.

⁷ Rix v. Ins. Co., 20 N. H. 198; Germania Ins. Co. v. Boykin, 79 U. S. (12 Wall.) 433.

give it through his agent; and where a third person gives a written notice for him, it is not necessary that his agency shall appear on its face.¹ The contract may require the notice to be given to certain officers or agents of the company. Such requirements must be strictly complied with, and the notice given to the person designated.² Where notice of loss is required to be given to the secretary of the company, *in writing*, a written notice to him from the local agent, upon information conveyed by the insured, is sufficient.³ But where the condition requires that the notice shall be given in writing to the secretary, notice by parol to an agent will be of no effect.⁴ Where the policy does not in terms require a statement of the date of an accidental injury, the date in the notice and proof is not so material that a misstatement of it, without any improper motive, will prevent the plaintiff from maintaining his action, if the company is in no way misled or prejudiced by it.⁵

§ 416. In giving a notice there must be no unnecessary delay, nothing which the law calls laches. The terms "forthwith," "immediately," and "as soon as possible," used in connection with the giving of notice under a policy of insurance, are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. In ordinary cases, when such terms are used, whether the insured has been duly diligent in giving notice of the injury received by him, or whether his legal representatives, family, heirs, or other proper persons have been guilty of unnecessary delay in giving notice of his accidental death, are, under all the circumstances of such cases, questions of fact to be determined by the jury under proper instructions from the court.⁶ Where notice is required to be

¹ Stimpson v. Ins. Co., 47 Me. 349; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Sims v. Ins. Co., 47 Mo. 51.

² Patrick v. Ins. Co., 43 N. H. 621; Inland Co. v. Stauffer, 33 Pa. St. 397.

³ West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Germania Ins. Co. v. Curran, 8 Kan. 9; Killips v. Ins. Co., 28 Wis. 472; see American Ins. Co. v. Norment, 91 Tenn. 1; 18 S. W. Rep. 395.

⁴ Patrick v. Ins. Co., 43 N. H. 621.

⁵ Young v. Travelers' Ins. Co., 80 Me. 244; 13 Atl. Rep. 896; American Ins. Co. v. Norment, 91 Tenn. 1; 18 S. W. Rep. 395.

⁶ Edwards v. Ins. Co., 3 Gill (Md.) 176; Phillips v. Ins. Co., 14 Mo. 220; Peoria Ins. Co. v. Lewis, 18 Ill. 553; O'Brien v. Ins. Co., 76 N. Y. 459; Continental Ins. Co. v. Lippold, 3 Neb. 391; Providence Life v. Martin, 32 Md. 310; Lyon v. Assurance Co.,

given "forthwith," a delay of thirty-eight days,¹ or even of eleven days,² is unreasonable. Where a by-law of the company required "immediate" notice of a loss, and notice was not given until eleven days after it occurred, and no sufficient excuse was shown for the delay, it was held to be too late.³ An accident policy required "immediate" notice of an injury to be given, and it was held that a notice given six days after the injury, which happened in the city where the policy was issued, and where the company had a resident agent, was too late, where no excuse was shown for the delay.⁴ A statute⁵ prohibited foreign insurance companies doing business in the state from inserting in their policies of insurance a condition requiring the insured to give notice of loss forthwith, or within a period of less than five days. It was held⁶ that where such a condition was inserted in a policy issued by a foreign insurance company, it was void, but that, nevertheless, under a policy containing such a condition, the insured was required to give notice within a reasonable time, and that an unexplained delay of fifty days in giving notice of loss was unreasonable.⁷ Where a loss occurred on the 15th day of a month, and the insured knew of it on the 18th and sent notice by mail on the 23d, it was held to be a sufficient compliance with a condition of the policy, requiring notice to be given forthwith;⁸ and where the notice is received by the company five days after the loss,

46 Iowa 631; *Palmer v. Ins. Co.*, 44 Wis. 201; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Pennypacker v. Ins. Co.*, 80 Iowa 56; 45 N. W. Rep. 408. But where there is no dispute as to the facts concerning the giving of the notice, and the diligence used in that regard, the question is one of law for the court to decide. *Kimball v. Ins. Co.*, 8 Gray (Mass.) 33; *Bennett v. Ins. Co.*, 67 N. Y. 274; *Pickels v. Ins. Co.*, 119 Ind. 291; 21 N. East. Rep. 898; *Ins. Co. v. Prim*, 111 Ind. 281; 12 N. East. Rep. 315; see *American Ins. Co. v. Norment*, 91 Tenn. 1; 18 S. W. Rep. 395; *McFarland v. U. S. Association (Mo.)*, 27 S. W. Rep. 436.

¹ *Inman v. Ins. Co.*, 12 Wend. 452.

² *Whitehurst v. Ins. Co.*, 42 N. C. (7 Jones) 433.

³ *Trask v. Ins. Co.*, 29 Pa. St. 198; see *Smith v. Ins. Co.*, 1 Allen 297.

⁴ *Railway Passenger Assurance Co. v. Burwell*, 44 Ind. 460; 3 Ins. L. J. 281.

⁵ Section 3770, Rev. Stat. 1881 of Indiana.

⁶ *Insurance Co. v. Brim*, 111 Ind. 281; 12 N. East. Rep. 315.

⁷ See *Pickels v. Ins. Co.*, 119 Ind. 291; 21 N. East. Rep. 898; *Baker v. Ins. Co.*, 124 Ind. 490; 24 N. East. Rep. 1041; *Ins. Co. v. Lindsey*, 26 Oh. St. 348; *Patrick v. Ins. Co.*, 43 N. H. 621; *Mellen v. Ins. Co.*, 17 N. Y. 609.

⁸ *N. Y. Ins. Co. v. Insurance Co.*, 20 Barb. 468.

such a condition is complied with.¹ In one case fifteen days was held to be a reasonable time within which to give notice,² and in another ten days was held to be a reasonable time.³

§ 417. The object of notice is to enable the insurance company, within a reasonable time after the death or injury of the insured, to inquire into all the facts and circumstances while they are fresh in the memory of witnesses, in order to determine whether it is liable, or not, upon its contract. The condition that notice shall be given operates upon the contract of insurance only subsequent to the fact of the loss, and it must, therefore, receive a liberal and reasonable construction in favor of the beneficiary under the contract. A contract contained the following provision: "Notice of any accidental injury, for which claim is to be made under this certificate, shall be given in writing * * * with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate." On August 22, a large office building in which insured had his office fell, crushing many to death. He was killed, but the fact was not known until the 25th, when his body was found in the ruins. Notice of his death was given on September 2, which was within ten days from the discovery of the body, but not within ten days from the day of the accident, when his death must have occurred. The court said: "The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred, and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. * * To hold that the plaintiff was bound to

¹ West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Schenck v. Ins. Co., 24 N. J. (4 Zabr.) 447. ² Ind. App. 361; 28 N. East. Rep. 868. ³ McNally v. Ins. Co., 137 N. Y. Co., 33 N. East. Rep. 475.

³ Germania Ins. Co. v. Deckard, 3

give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made.”¹

There was a clause in a policy requiring that “in the event of injury, within the meaning of this policy, occurring to the assured, he, or in case of his death, his legal representatives, shall as soon thereafter as possible, give notice thereof to the company at their office in C. or to the agent writing the policy, together with the full name, occupation and address of the assured, with full particulars of the accident or injury.” The insured died from the effect of a gun-shot wound, at a place so near C., where the office of the company was, that notice of his death might have been given to the company in one day thereafter. The beneficiary lived at the time at the place where the insured died, but did not give notice to the company until eight or ten days after his death. The policy was in the trunk of the insured at C. when he died, and had never been in the possession of or been seen by the beneficiary before the end of said eight or ten days, when he at once notified the company of the death of the insured. It was held that the clause above quoted must receive a reasonable construction; and, under the circumstances of the case, the notice given was sufficient.² A condition in a policy provided that “in the event of accidental injuries for which claim may be made, immediate notice shall be given in writing to the company at Hartford, stating full name, etc., with full particulars of the accident and injury, of which direct and affirmative proof shall be furnished within seven months from the happening of the accident. Failure to give such immediate written notice, or to furnish such direct and affirmative proof, within the time aforesaid, shall invalidate all claims under this contract.” It was held that the condition did not require the proof of the injury to be sent to Hartford, and on this subject the court said: “If the company intended to require the proofs to be sent to Hartford, Connecticut, it could have so

¹ *Tripp v. Society*, 140 N. Y. 23; 35 N. East. Rep. 316; *Insurance Co. v. Boykin*, 12 Wall. 433.

² *Provident Life v. Baum*, 29 Ind. 236; see *Germania Ins. Co. v. Boykin*, 79 U. S. (12 Wall.) 433.

provided in express terms. The policy requires the notice to be given to the company at that place, but it does not require the proofs to be furnished the company at that or any other particular place. This is reasonable; for the officers or agents of the company nearest the place of the accident could examine the case and ascertain the facts with much more facility than the officers at the main office in a distant state; and if they were so furnished they would probably have to be sent back for investigation to those representing the company nearer at hand."¹ When notice and sufficient proof of the injury are required to be given, sufficient preliminary proof must be made to make out a *prima facie* case of injury resulting from accident.²

§ 418. Where a policy provides that "in the event of any accident, whether fatal or not, occurring to the insured within the intent and meaning of this policy, notice thereof in writing must be delivered to the company, at their chief office, within seven days after the occurrence of the accident," this provision is not discharged by reason of the fact that, owing to the act of God, the accident was of so sudden and fatal a character that it was impossible to have given the required notice within seven days after the accident; inasmuch as the terms of the policy are such as to negative any presumption bringing it within the class of cases in which it has been held that, in the nature and import of the contract itself, there was that which involved the implied condition that the destruction of the person or thing with which the contract dealt should absolve a party from its performance. Such a contract as the one quoted requires that notice shall be given by some one, and the instantaneous death of the insured does not render it impossible to do what the condition requires, since it may be done by a survivor. If the insured does not take the necessary means of enabling some one who is likely to survive him to give the necessary notice, the fault is his, not that of the company. If he does not apprise the beneficiary of the existence of the policy, and of the strict condition contained in it, the misfortune is upon the beneficiary. The instantaneous death of the insured will only occasion the omission to give

¹ *Scheiderer v. Ins. Co.*, 58 Wis. 13. ² *N. Am. Life v. Burroughs*, 69 Pa. St. 43.

the necessary notice, when he neglects to provide for that contingency; and the fact that, during the time limited for the giving of notice, no person had knowledge of the existence of the policy, does not excuse the want of timely notice. Such a condition as the one above quoted is not unreasonable.¹

§ 419. **Waiver of notice.**—Provisions of a policy requiring the giving of notice of injury or death are for the benefit of the company and may be waived by it. Such a waiver may be made in express terms, or may be inferred from any acts of an officer or general agent of the company, which would lead a prudent man to think that the giving of the notice would not be insisted upon. Mere knowledge on the part of an agent that an injury has happened to the insured, will not relieve the latter from the duty of giving the notice as required by the contract.² If the notice given on the part of the insured is defective or erroneous, and the company retains it without objection beyond a reasonable time to examine and return it, or if the company, after notice has been given, puts its refusal to pay on some other ground, this is a waiver of all objections to the notice. The defect being formal and capable of correction and amendment, must be pointed out to the person offering the notice, in order that he may have an opportunity to supply the needed requirements. But a failure to give the notice within the time stipulated in the contract, is an entirely different matter from a failure to give a notice in due form. The company is not required to notify the insured or the beneficiary of a policy either that notice of an injury or of death must be given within a certain time, or that no notice will be received because the time for the giving of it under the contract has expired. The silence of the insurance company upon a defect in the form of the notice might be very injurious to the assured, but it is not at once seen how the assured could be benefited by notice that he had failed to give information of his loss within the stipulated time, or how he could be prejudiced by the omission to state to him that he had failed to do so. After the time for the giving of the notice has expired, the company need not positively refuse to receive it, or take any

¹ *Gamble v. Assurance Co., Irish Reports*, 4 Com. L. 204; 2 Big. L. & Acc. Cases, 681.

² *Smith v. Ins. Co.*, 1 Allen, 297.

other unequivocal steps to indicate its determination to resist the payment of the insurance, unless the notice is tendered.¹

A vote by the directors of a company to postpone indefinitely the subject of a loss will not be deemed a waiver of a condition of a policy requiring notice to be given.² The giving of a notice of death or injury may be waived by a mutual insurance company, even when such a notice is required to be given by its charter. A provision for the giving of notice does not touch the substance or essence of the contract, or affect its validity, but relates only to the form or mode in which the liability of the company is to be ascertained and proved. It is for the guidance and benefit of the company, and its officers may waive it.³ A stipulation in an accident policy that the assured shall claim no waiver by reason of any act of the agent, unless the agent is so authorized by the president or secretary of the company in writing, is confined to those provisions of the policy which make it a valid and binding contract, and does not extend to stipulations which are to be performed after the loss has occurred; and an agent, who has power to adjust losses, and whose recommendations about paying them are followed by the company, must be taken to be a general agent, with power to waive the giving of notice of an injury.⁴ Where the secretary of a company writes to the beneficiary, or to some one acting for him, stating that the claim is not valid by reason of the cause of the death of the insured, and because of the manner in which the injury was received, it is for the jury to say whether such statement does not indicate an intention to waive the giving of notice.⁵ An accident policy required that immediate notice of any accidental injury should be given to the company in writing, and provided that the failure to give such notice within ten days after the date of such injury should invalidate all claims under the policy. A month after an acci-

¹ St. Louis Ins. Co. v. Kyle, 11 Mo. Ins. Co., 72 Cal. 297; 13 Pac. Rep. 863; 278; Patrick v. Ins. Co., 43 N. H. Somers v. Protective Union, 42 Kans. 621; Beatty v. Ins. Co., 66 Pa. St. 9; 619.

Brink v. Ins. Co., 70 N. Y. 593.

⁵ Reynolds v. Association, 1 N. Y.

² Patrick v. Ins. Co., *supra*.

Sup. 738; Prentice v. Ins. Co., 77 N.

³ Lewis v. Ins. Co., 52 Me. 492; Y. 483; Brink v. Ins. Co., 80 N. Y. Broom, Legal Maxims, 547.

108; American Ins. Co. v. Norment,

⁴ Travelers' Ins. Co. v. Harvey, 82 Va. 949; 5 S. E. Rep. 553; Carroll v. 91 Tenn. 1; 18 S. W. Rep. 395.

dent, a letter was addressed to, and received and retained by the company, giving notice of the injury. Afterward, its secretary stated to an agent of the plaintiff that the notice was sufficient. The court held that it had waived the requirements as to the notice by receiving and retaining the letter.¹

It is well settled that defenses of insufficient proofs or notice are waived, when the company, with knowledge of all the facts, requires the beneficiary under the contract of insurance to do some act or incur some expense or trouble, inconsistent with the claim that the contract had become inoperative in consequence of a breach of some of its conditions.²

§ 420. **Payment of claim from a special fund or in a special manner.**—Where claims for indemnity are payable only from the accident fund, or from any moneys which may be realized for that fund from an assessment upon the members of the society, a claimant's right of recovery is limited to the amount in that fund, and to the amount which can be brought into it by a proper assessment, according to the plan of insurance.³

¹ *Brink v. Accident Association*, 7 N. Y. Supp. 847.

³ *Hesinger v. Home Ben. Association*, 41 Minn. 516; 43 N. W. Rep.

² *McNally v. Ins. Co.*, 137 N. Y. 481; *Kerr v. Association*, 39 Minn. 389; 33 N. East. Rep. 475; *Jones v. Supreme Lodge v. Knight*, 117 Ins. Co., 117 N. Y. 103; 22 N. East. Ind. 489; 20 N. East. Rep. 479; *Old Rep.* 578; *Trippe v. Ins. Co.*, 140 N. Wayne Ass'n v. Nordby, 122 Ind. Y. 23; 35 N. East. Rep. 316; *Ins. Co.* 446; 24 N. East. Rep. 159. *v. Edwards*, 122 U. S. 457; 7 Sup. Ct. Rep. 1249.

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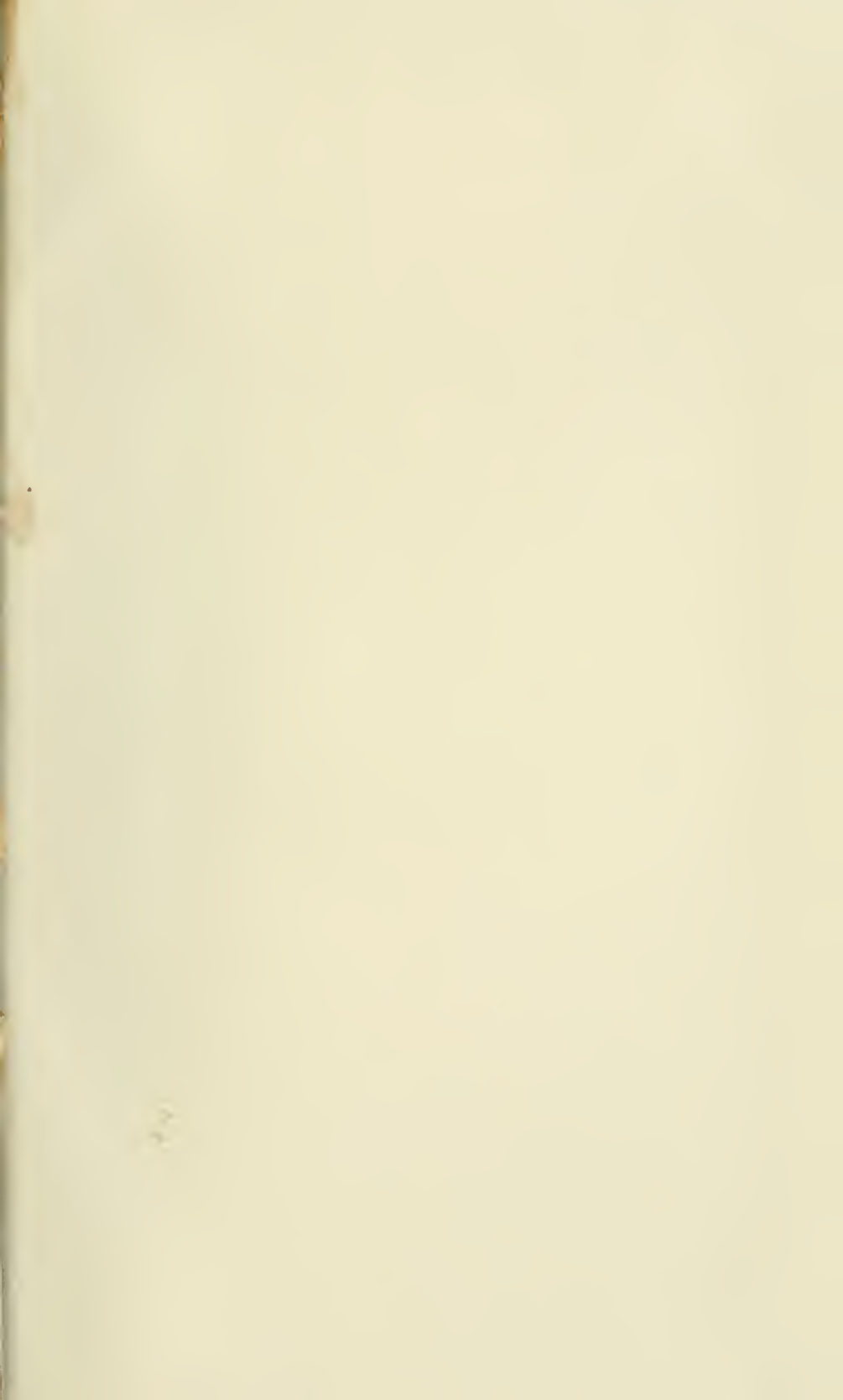
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